CLERK'S COPY. 7754 31 Sup. Ct

156

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 373

ROY COLE AND LOUIS JONES, PETITIONERS,

vs.

STATE OF ARKANSAS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1947.

CERTIORARI GRANTED DECEMBER 8, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 373

ROY COLE AND LOUIS JONES, PETITIONERS,

vs.

STATE OF ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON. D. C., OCTOBER 6, 1947.

—2773

[fols. 1-2]

IN THE PULASKI CIRCUIT COURT, FIRST DIVISION

STATE OF ARKANSAS, Plaintiff,

vs.

ROY COLE (CM), LOUIS JONES (CM), JESSIE BEAN (CM), Defendants

FELONY INFORMATION—February 7, 1946

Comes Sam Robinson, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas information gives accusing Roy Cole, Louis Jones and Jessie Bean of the crime of felony, committed as follows, to-wit: On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas.

Sam Robinson, Prosecuting Attorney.

Subscribed and sworn to before me on this 7th day of Nov., 1946. Tom Newton, Circuit Clerk, by H. E. Cape, Deputy Circuit Clerk.

[fol. 3] Issue Bench Warrant and require bail in the sum of —— Dollars.

—— ——, Judge.

[File endorsement omitted.]

[fols. 4-6] Bail Bonds for $1000.00 approved and filed Nov. 12, 1946 omitted in printing.

[fol. 7] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION AS TO PRIOR INDICTMENTS—Filed January 22, 1947

Comes the defendants and respectfully move the Court to direct the clerk of this Court to submit the record of the trial in this cause by inserting therein, the Indictments against the defendants in case No. 46482, which Indictment was quashed by order of this Court, on the 21st day of November, 1946, as shown in the judgment records of said Court, in Vol. 41, Page 208.

Respectfully submitted, Ross Robley & Elmer Schoggen, Attorneys for defendants.

[File endorsement omitted.]

[fol. 8] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER QUASHING PRIOR INDICTMENTS—November 21, 1946

This day comes the State of Arkansas by Sam Robinson, Prosecuting Attorney, and comes the defendants by their attorney Ross Robley, and the Court on its own motion, in view of the identity of alleged offenses in case Number 46994 and 46482, this case is quashed.

It is therefore considered, ordered and adjudged by the Court that each of said defendants go hence discharged hereof as to case Number 46482, and that Pulaski County pay all costs of this prosecution.

[fol. 9] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—November 25, 1946

This day comes the defendants by their Attorney Elmer Schoggen, and by leave of Court files a demurrer to the Information filed herein, which is presented to the Court;

and the Court being well and sufficiently advised, doth overrule the demurrer. To which action of the Court in overruling the demurrer the defendants save their exceptions.

[fol. 10] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

DEMURRER—Filed November 25, 1946

Comes the defendants and states that the information filed against them is so indefinite and uncertain that it does not state a cause of action against the defendants cognizable under the law of the State of Arkansas or of the United States.

Wherefore, defendants pray that the information against them be quashed, set aside and held for naught.

Ross Robley & Elmer Schoggen.

Duly sworn to by Elmer Schoggen. Jurat omitted in printing.

[fol. 11] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

DENIAL OF PLEA OF FORMER ACQUIT-AL—November 25, 1946

This day comes the defendants by their attorney Elmer Schoggen, and by leave of Court files a plea of former acquittal to the information filed herein, which is presented to the Court; and the Court being well and sufficiently advised, doth overrule said plea; to which action of the Court in overruling said plea, the defendants save their exceptions.

[fol. 12] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

PLEA OF FORMER ACQUITTAL—Filed November 25, 1946

Comes the defendants and plead that on March 18th, they were found guilty under an indictment charging the

same offense as contained the present information. They state that on appeal to the Supreme Court of the State of Arkansas the judgment of the conviction was reversed and that, thereafter this Court quashed the indictment in said cases

Defendants state that the present information filed by the Prosecuting Attorney, is as to the same act upon which these defendants were prosecuted and the charge against them dismissed.

Wherefore, these defendants plead that they have already been in jeopardy, and pray further that the information be quashed, set aside and held for naught.

Ross Robley and Elmer Schoggen.

Duly sworn to by Elmer Schoggen. Jurat omitted in printing.

[fol. 13] In Circuit Court of Pulaski County

[Title omitted]

Order Overruling Motion to Quash—November 25, 1946

This cay comes the defendants by their attorney Elmer Schoggen, and by leave of Court files a motion to quash Information filed herein, which is presented to the Court; and the Court being well and sufficiently advised on said motion, doth overrule said motion. To which action of the Court in overruling said motion the defendants save their exceptions.

[fol. 14] In Circuit Court of Pulaski County

[Title omitted]

Motion to Quash Information—Filed November 25, 1946

Comes the defendants and state that the Act No. 193 of the General Assembly of 1943 under which defendants are indicted herein is in violation of the Constitution of the State of Arkansas and of the United States of America, in that the said act undertakes to make a felony of acts that would under other circumstances be a misdemeanor.

Whereupon, defendants pray that said information be quashed, set aside and held for naught.

Ross Robley & Elmer Schoggen.

Duly sworn to by Elmer Schoggen. Jurat omitted in printing.

[fol. 15] In Circuit Court of Pulaski County

[Title omitted]

Minute Entry Re Trial and Convictions

This day comes the State of Arkansas by Sam Robinson, Prosecuting Attorney, and comes the defendants in proper person, and by their attorneys Ross Robley and Elmer Schoggen, and parties announce ready for trial, defendants each waive arraignment and formal drawing of a jury, and each enter their plea of not guilty, and by agreement are tried together; thereupon comes twelve qualified electors of Pulaski County, viz: W. D. Billingsley, Ralph Hill, R. E. Herndon, Roy Pritchett, Harry Schmuck, George Boshears, George Lewis, Lee Hardcastle, J. B. Davenport, W.W. Finch, E. R. Young and W. S. Dabbs, who being duly selected, are duly accepted, empaneled and sworn as a trial jury in this case; and after hearing the testimony to be adduced, the instructions of the Court and the argument of Counsel the jury retires to consider of arriving at a verdict. And after a deliberation thereon return into Court with the following verdict against each defendant. We the jury find the defendant Roy Cole, Louis J. Jones and Jessie Bean guilty of a felony as charged in the Information, and leave the punishment to the Court.

George Lewis, Foreman.

Thereupon the jury is discharged from the case, and the defendants are each released upon their present bond, and are given Twenty (20) days in which to file a motion for new trial in the case.

[fol. 16] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER EXTENDING TIME TO FILE MOTION FOR NEW TRIAL—December 12, 1946

This day comes the defendants by their attorney Elmer Schoggen, and at his request the Court doth grant an additional fifteen days in which to file a motion for new trial.

[fol. 17] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION AND ORDER RE PRIOR INDICTMENT—January 22, 1947

This day comes the defendants by their attorney Elmer Schoggen, and by leave of court files a motion to insert in transcript a copy of the Indictment Number 46482, which was quashed on November 21st, 1946. Which motion is by the court granted.

[fol. 18] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

PRIOR INDICTMENT—Filed January 24, 1946

The Grand Jury of Pulaski County in the name and by the authority of the State of Arkansas, accused Roy Cole, Louis Jones and Jessie Bean of the crime of felony, committed as follows, to-wit: The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, A.D. 1945, did then and there wilfully, unlawfully and feloniously, by the use of force and violence, prevent Otha Williams from engaging in work as a laborer at the Southern Cotton Oil Company, said work being a lawful vocation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas.

Sam Robinson, Prosecuting Attorney.

Witnesses: Otha Williams, Willie Johnson, Willie Brown.

[Endorsed:] No. 46482. State of Arkansas, vs. Roy Cole, Louis Jones, Jessie Bean. A True Bill. C. M. Burrow, Foreman. Indictment for Felony. Filed in open Court in the presence of all the Grand Jurors, this 4th day of January, 1946. Tom Newton, Clerk, by H. E. Cape, D. C.

[fol. 19] [File endorsement omitted]

[fol. 20] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed December 28, 1946

Comes the defendants and respectfully prays the Court to grant them a new trial in this cause for the following reasons:

1. Because the verdict of the jury rendered on November 25, 1946, is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to both the law and the evidence.

4. The court erred in overruling the prayer of the defendants for former acquittal.

5. The court erred in overruling the motion of the defendants to quash the information against them on the grounds that Act No. 193 of the General Assembly of Arkansas of 1943, is in violation of the constitution of the State of Arkansas, and the constitution of the United States.

6. The court erred in overruling the demurrer of the defendants to the information filed against them by the Prosecuting attorney, to the overruling of which motions and demurrer the defendants, at the time, objected and saved their exceptions.

7. The court erred in permitting the Prosecuting Attorney, over the objections and exceptions of the defendants, to cross-examine the State's witness, Willie Johnson, to prove by him that he saw Robert Brooks at the scene of the fight, when Robert Brooks was not on trial.

8. The court erred in permitting the State to prove by the witness, Elvie Washington, that someone, unknown to the witness, made an attack on Otha Williams.

[fol. 21] 9. The court erred in permitting witness Willie Brown to testify over the objections and exceptions of the defendants, that one Campbell made an attack on Otha Williams.

10. The court erred in ruling that the testimony of Willie Brown sufficiently identified Campbell as the man alluded to by the witness, Washington, over the objection and exceptions of the defendants.

11. The court erred in overruling the motion of the defendants for a directed verdict of not guilty, at the close of the evidence on behalf of the State, over the objection and exceptions of the defendants.

12. The court erred in excluding from the jury, the testimony of Roy Cole, that Witness Willie Brown kept guns in his locker, over the objection and exceptions of the defendants.

13. The court erred in overruling the motion of the defendants for an instructed verdict of not guilty at the close of all the evidence in the case, over the objection and exceptions of the defendants.

14. The court erred in giving the State's prayer for instruction No. 1, over the general and specific objection of the defendants.

15. The court erred in giving the State's prayer for instruction No. 2, over the objection and exceptions of the defendants.

16. The court erred in refusing to give to the jury, the prayer of the defendants for instruction No. 11, to which action of the court, the defendants objected and saved their exceptions.

Wherefore, defendants pray that the verdict of the jury in these cases be set aside and that they be granted a new trial.

Respectfully submitted, Ross Robley, Elmer Schoggen, Attorneys for Defendants.

[fol. 22] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER GRANTING MOTION TO SUPPLEMENT RECORD—December 31, 1946

This day comes the defendants by their attorney, Elmer Schoggen, and by leave of court files a motion to supplement record in this case, which motion is presented to the court, and is by the court granted.

[fol. 23] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION TO SUPPLEMENT RECORD—Filed December 31, 1946

Comes the defendants and respectfully move the court to direct the clerk of this Court to supplement the record of the trial in this cause by inserting therein the order of this Court made in case No. 46482, on November 21, 1946, in which case, the State of Arkansas was plaintiff and these defendants were defendants therein, by which order this Court, on its own motion, quashed the indictment and further proceedings in case No. 46482, against these defendants. This order is entered of record in the judgment records of this Court, Volume 41, page 208.

Respectfully submitted, Ross Robley and Elmer Schoggen, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 24] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—December 31, 1946

This day comes the State of Arkansas by Thomas E. Downie, Assistant Prosecuting Attorney, and comes the defendants by their attorneys, Ross Robley and Elmer

Schoggen, and the motion for new trial heretofore filed is presented to the court; and after hearing the argument both for the State and for the defendants, the Court doth overrule said motion. To which action of the Court, in overruling said motion the defendants save their exceptions, and prays and appeal to the Supreme Court, which is by the Court granted, and defendants are given Five (5) days in which to file their Bill of Exceptions, and the appeal bonds are each fixed at Fifteen Hundred ($1500.00) dollars.

[fol. 25] IN CIRCUIT COURT OF PULASKI COUNTY

46994

Felony

STATE OF ARKANSAS

vs.

ROY COLE

JUDGMENT RE COLE

This day comes the State of Arkansas by Thomas E. Downie, Assistant Prosecuting Attorney, and comes the defendant in proper person, and by his attorneys, Ross Robley and Elmer Schoggen, and defendant is called to the bar of the Court, and informed of the nature of the Information filed herein, his plea thereto, and the verdict of the jury thereon finding him guilty as charged in the Information, and leaving the punishment to the Court. And the defendant being now before the Court for judgment, says nother further whereupon the Court doth assess his punishment as a sentence of One (1) year imprisonment in the State Penitentiary.

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Pulaski County, and to be by him safely and speedily transported to the Penitentiary House or State Confict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of One (1) year, and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution

therefor. It is further ordered by the Court that the clerk of this court make out and deliver to said Sheriff a certified copy of the foregoing judgment, to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said Roy Cole in the manner aforesaid.

[fol. 26] IN CIRCUIT COURT OF PULASKI COUNTY

46994

Felony

STATE OF ARKANSAS

vs.

LOUIS JONES

JUDGMENT RE JONES—December 31, 1946

This day comes the State of Arkansas by Thomas E. Downie, Assistant Prosecuting Attorney, and comes the defendant in proper person, and by his attorneys, Ross Robley and Elmer Schoggen, and defendant is called to the bar of the Court, and informed of the nature of the Information filed herein, his plea thereto, and the verdict of the jury thereon finding him guilty as charged in the Information, and leaving the punishment to the Court; and the defendant being now before the Court for Judgment, says nothing further, Whereupon the Court doth assess his punishment at a sentence of One (1) year imprisonment in the State Penitentiary.

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Pulaski County, and to be by him safely and speedily transported to the Penitentiary House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of One (1) year, and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution therefor. It is further ordered by the Court that the clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said Louis Jones in the manner aforesaid.

[fol. 27] IN CIRCUIT COURT OF PULASKI COUNTY

46994

Felony

STATE OF ARKANSAS

vs.

JESSIE BEAN

JUDGMENT RE BEAN—December 31, 1946

This day comes the State of Arkansas by Thomas E. Downie Assistant Prosecuting Attorney, and comes the defendant in proper person, and by his attorneys Ross Robley and Elmer Schoggen, and defendant is called to the bar of the Court, and informed of the nature of the Information filed herein, his plea thereto, and the verdict of the jury thereon finding him guilty as charged in the Information, and leaving the punishment to the Court; and the defendant being now before the Court for judgment, says nothing further. Whereupon the Court doth assess his punishment at a sentence of One (1) year imprisonment in the State Penitentiary.

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Pulaski County, and to be by him safely and speedily transported to the Penitentiary House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the pe-iod of One (1) year, and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution therefor. It is further ordered by the Court that the clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for his to receive and confine the said Jessie Bean in the manner aforesaid.

[fols. 28-30] Bonds on Appeal for $1500 Approved and filed Dec. 31, 1946, omitted in printing.

[fol. 31] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

ORDER RE APPROVING, SIGNING AND FILING BILL OF EXCEPTIONS —January 2, 1947

This day comes the defendants by their attorney Elmer Schoggen, and presents their Bill of Exceptions herein, which being duly examined, is approved and signed by the Judge, and is ordered filed and made a part of the record in this case.

[fols. 32-86] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

BILL OF EXCEPTIONS

Be It Remembered that on this 25th day of November, 1946, the same being a day of the regular September 1946 term of the Pulaski Circuit Court, First Division, before the Honorable Gus Fulk, Judge of said Court, present and presiding, this cause came on to be heard, the State being represented by Mr. Sam Robinson, the Prosecuting Attorney, and Mr. Thomas E. Downie, Deputy Prosecuting Attorney, its attorneys, the defendants being represented by Mr. Elmer Schoggen and Mr. Ross Robley, their attorneys, and both parties announcing ready, thereupon the following proceedings were had and done, objections made, exceptions saved, etc., to-wit:

The Court: Do you waive arraignment and formal drawing of the jury and plead not guilty?

Mr. Schoggen: We do, your Honor.

. . . . . .

[fol. 87] The Court: Gentlemen, is there anything further to be said about the members of the jury selected for this trial?

Mr. Robinson: The jury is satisfactory for the State, may it please the court.

Mr. Schoggen: The jury is satisfactory to the defendants.

Thereupon, the jury was sworn to try the case.

(At this time, the court recessed until 2:00 o'clock P. M. the same day, after the court had admonished the jury not to separate and not to discuss the case among themselves or with anyone else.)

COURT'S NOTE RE TESTIMONY OF DR. JOE SHUFFIELD

The Court: Let the record show that it is stipulated and agreed by counsel, the defendants being present, that the court and counsel retire to chambers and there take the testimony of Dr. Joe Shuffield, a witness on behalf of the defendants who in an emergency cannot remain, and that said testimony can be transcribed and read to the jury as the testimony of Dr. Joe Shuffield as stated.

(Thereupon, the testimony of Dr. Shuffield was taken in chambers during the recess and later transcribed by the reporter to *the* read in evidence in the trial of this case.)

The court reconvened at 2:00 o'clock P. M., and after the opening statements by counsel, the following proceedings were had and done, to-wit:

The state, to sustain the issues in its behalf, introduced the following testimony, to-wit:

[fol. 88] MR. ROY CASTILLOW, a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. State your name?
A. Roy Castillow.
Q. What is your occupation?
A. I am Superintendent of the Southern Cottol Oil Company.
Q. How long *youe* you been with that company?
A. 13 years.
Q. Where is your plant located?
A. At the foot of East 9th Street, North Little Rock.
Q. Here in Pulaski County?
A. Yes, sir.
Q. Mr. Castillow, did a strike occur at that plant last December?
A. Yes, sir.
Q. When was it the men walked out on strike?

A. December 17th.
Q. December 17th?
A. Yes.
Q. Was Otha Williams working there at that time?
A. Yes, sir.
Q. Did he go out on strike?
A. No, sir.
Q. Did Willie Brown go out on strike?
A. No, sir.
Q. Did Willie Johnson go out on strike?
A. No, sir.
Q. Did Elvie Washington Williams go out on strike?
A. No, sir.
Q. Those four men did not go out on strike?
A. No, sir.

[fol. 89] The Court: The record here has the name Willie Jackson. I just wanted you to be sure.

Mr. Robinson: That is a misprint some way, your Honor.

Q. Now do you know the defendant, Jessie Bean?
A. Yes, sir.
Q. Was he working there at that time?
A. Yes, just before the strike.
Q. Did he go out on strike?
A. Yes, sir.
Q. Do you know the defendant, Roy Cole?
A. Yes, sir.
Q. Did he go out on strike?
A. Yes, sir.
Q. And did the defendant, Louis Jones, go out on strike?
A. Yes, sir.
Q. That was on the 17th day of last December?
A. Yes.
Q. Now, on the 26th day of December of last year, were these men still out on strike.
A. Yes, sir.
Q. Then a labor dispute existed at the plant of the Southern Cotton Oil Company at that time?
A. Yes, sir.

Mr. Robinson: I believe that is all.

Cross-examination.

By Mr. Schoggen:

Q. Mr. Castillow, there never was any trouble there at the plant proper, was there?

A. No, sir.

Q. Now, when these men went out on strike on December 17, 1945, what condition was the plant in as to being full of seed and so forth?

[fol. 90] A. It was in a normal operation. We had about our peak storage of seed on hand.

Q. And when the employees went out on strike, there were about 112 of them, *wasn't* there?

A. Yes, in that neighborhood.

Q. And that made it necessary for you to shut the plant down, didn't it?

A. Yes, sir.

Q. And you were not able to get the plant in operation again until in January after you had gone into Chancery Court and gotten an injunction against picketing. That is correct, isn't it?

A. Yes, sir.

Q. Then, after you got that injunction on the 3rd or 4th of January, you were able to resume your normal operation of the plant?

A. What date was that?

Q. I believe January?

A. January 24th.

Q. It was January 24th when that injunction was granted?

A. No, I don't know when the injunction was granted. It was January 24th when the plant started operation.

Q. After you got the picketing stopped by injunction, you were able to go ahead with your normal operation?

A. About two or three weeks.

Q. About two or three weeks?

A. Yes.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. You were asked with reference to the trouble occurring on the property of the Southern Cotton Oil Company. Do you know where the trouble did occur?

A. Yes, sir.

[fol. 91] Q. How close was that to the property of the Southern Cotton Oil Company?

A. Half a block.

Q. As a matter of fact, it was across the railroad, wasn't it?

A. A few feet across the railroad right-of-way.

Q. That is near the property of the Southern Cotton Oil Company where the labor dispute existed?

A. That is correct.

Mr. Robinson: That is all.

Recross-examination.

By Mr. Schoggen:

Q. Mr. Castillow, during the time the pickets were walking back and forth there, you went in and out all the time, didn't you?

A. Yes, sir.

Q. Do you recall talking to one of the defendants, Louis Jones, on the morning of the 26th of December?

A. Yes, but I couldn't swear it was that date, but I almost could. I believe it was the morning of the 26th.

Q. It was shortly after he had come back from burying his mother, wasn't it?

A. I don't remember that—whether he had just come back from burying his mother or what happened to him.

Q. You were not, I believe, Mr. Castillow, down there on 9th Street when the trouble between some of the boys arose?

A. No, I wasn't at the plant.

Q. You were not at the plant?

A. No, sir.

Q. So all you know about where that happened is what you have been told about it?

A. What I have been told.

Q. You don't know anything about that at all?

[fol. 92] A. No, sir, I don't know anything about that at all.

Q. You don't know anything about these three defendants here, Mr. Castillow, ever encouraging or aiding any unlawful assemblage, do you?

A. Just what I have been told.

Q. Just what you have been told. You don't know of your own personal knowledge?

A. No, sir.

Q. What time did you leave there on the afternoon of December 26th?

A. In the neighborhood of 2:30, I would say.

Q. In the neighborhood of 2:30?

A. Yes, sir.

Q. You don't know anything about who started the trouble, of your own knowledge?

A. Just what I have been told is all.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. All you know about that phase of it is what you have been told?

A. That is all.

Q. You weren't down there in the tent that morning?

A. I wasn't in the tent, no, sir.

Mr. Robinson: That is all.

Witness excused.

[fol. 93] WILLIE BROWN (CM), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is Willie Brown?

A. Yes, sir.

Q. Where do you work, Willie?

A. At the Southern Oil Mill.

Q. How long have you worked at the Southern Oil Mill?

A. About a year or better.
Q. About a year or better?
A. Yes, sir.
Q. Were you working down there the 17th day of last December when the men went out on strike?
A. Yes, sir.
Q. Did you go out on strike?
A. No, sir.
Q. You continued to work down there?
A. Yes, sir.
Q. Are you on parole from the penitentiary?
A. Yes, sir.
Q. How long have you been out of the penitentiary?
A. Since 1940.
Q. What kind of sentence did you have?
A. Life.
Q. You were sentenced from what County?
A. From Chicot County.
Q. You have been on parole since 1940?
A. Yes, sir.
Q. And in December of 1945 when the others went out on strike, you didn't go out on strike?
A. No, sir.
Q. Did you work down there on the 26th day of December, [fol. 94] the day after Christmas?
A. Yes, sir.
Q. Do you remember who else worked there that day?
A. Yes, sir.
Q. Who else worked there that day?
A. Otha Williams and Willie Johnson and—I forget the other boy, I can't call his name real good, but it is Cross.
Q. Lawrence Cross?
A. Yes, sir, and Washington.
Q. Elvie Washington Williams?
A. Yes, sir.
Q. What time did you all knock off from work that afternoon?
A. Around 5:00 o'clock or a little better.
Q. Around 5:00 o'clock or a little better?
A. Yes, sir.
Q. Did you all leave there together?
A. Yes, sir, we started out together.
Q. How many were at work that day?

A. Five of us.
Q. Five of you including yourself?
A. Yes, sir.
Q. Lawrence Cross just worked that day, didn't he?
A. Yes, sir.
Q. You say all five of you started to leave?
A. Yes, sir.
Q. Did you go back for anything?
A. Yes, sir, I and Otha went back to unload a truck.
Q. You and Otha went back to unload a truck of what?
A. Cotton seed.
Q. How did you unload the truck?
A. They have got a suction pipe that sucks the seed.
Q. You and Otha Williams did that?
A. Yes, sir.
[fol. 95] Q. Then did you go out?
A. Yes, sir.
Q. Did you catch up with the other boys then?
A. Yes, sir.
Q. Where were they?
A. They were in front of the office—that telegram pole opposite the office.
Q. They were in front of that telegram pole opposite the office?
A. Yes, sir.
Q. Which way did you all go?
A. We went on across the street.
Q. You were going in which direction?
A. Coming up East 9th Street.
Q. You were going West on East 9th Street?
A. Yes, sir.
Q. Coming toward town?
A. Yes, sir.
Q. Before you started across the street over there and when you were on the corner, did you see anybody across over there that was out on strike?
A. Yes, sir.
Q. Were they men you knew?
A. Yes, sir.
Q. Who did you see over there?
A. Bishop Jackson and Louis Jones and the boy that got killed and Robert Brooks.

Q. You saw Bishop Jackson, Louis Jones, and Walter Campbell, who got killed, and Robert Brooks?

A. Yes, sir.

Q. Did you see any of the others?

A. No, sir, not at that time.

Q. Did you start on across the street?

A. Yes, sir.

[fol. 96] Q. All right. When you got started across the street, did any of them say anything to you or any of the men you were with?

A. Yes, sir, Louis called Otha——

Q. That was Louis Jones?

A. Yes, sir, and told him to wait a minute, he wanted to talk to him, and Otha told him he didn't have time, he was on his way home and he would see him another day.

Q. Did he do anything else?

A. He gave a signal and said "Come on, boys."

Q. He gave a signal and said "Come on, boys"?

A. Yes, sir.

Q. That was after Otha Williams told him he didn't have time, that he was on his way home?

A. Yes, sir.

Q. What happened after Louis Jones gave the signal and said "Come on, boys"?

A. They flew up like blackbirds and came fighting.

Q. They flew up like blackbirds and came fighting?

A. Yes, sir.

Q. You didn't see Roy Cole before you went across the street?

A. No, sir, I didn't see him.

Q. Did you see Cole after that?

A. Yes, sir, he told me to go ahead on, that they wasn't after me.

Q. The defendant, Roy Cole, told you to go ahead on, that they wasn't after you?

A. Yes, sir.

Q. Did you go ahead on?

A. Yes, sir.

Q. Did Cole have any kind of waspon with him?

A. Yes sir, he had a stick.

Q. He had a stick?

A. Yes, sir.

[fol. 97] Q. That was the defendant, Roy Cole?

A. Yes, sir.
Q. Where did you go to?
A. I went and cought the car.
Q. You went and caught the car?
A. Yes, sir.
Q. Now, who were you walking with? Were you with Otha Williams?
A. We all was coming across together.
Q. You all were coming across together?
A. Yes, sir.
Q. Did you see anybody run?
A. The boy that got killed run and cut him off and hit him with a stick.
Q. That was Walter Campbell?
A. Yes, sir.
Q. Did you see him hit Otha Williams?
A. Yes, sir.
Q. What did he hit him with?
A. He hit him with a stick.
Q. Did you see Robert Brooks grab Willie Johnson?
A. No, sir.

Mr. Schoggen: I object to that, your Honor.
Mr. Robinson: I will withdraw the question.

Q. Did you see any of the rest of it?
A. No, sir, I didn't see any of the rest of it. Cole told me to go ahead on and I run and caught the car.
Q. Cole told you to go ahead on, that they weren't after you?
A. Yes, sir.

Mr. Robinson: That is all.

Cross-examination.

By Mr. Schoggen:

Q. Willie, are you still working down there at the Southern Cotton Oil Company?
[fol. 98] A. Yes, sir.
Q. Have you been working there right along?
A. Yes, sir.
Q. You have been on parole from the penitentiary since 1940?
A. Yes, sir.

Q. What did you get a life sentence for?

A. For murder.

Q. Who did you kill?

A. I killed a fellow down here—I can't call his name.

Q. It was a white man, wasn't it?

A. Yes, sir.

Q. You didn't want to get in any trouble, is that it?

A. I tried to stay out of it where I go, because I want to stay out.

Q. You want to stay out?

A. Yes, sir.

Q. Willie, you know these three defendants here, don't you?

A. Yes, sir.

Q. Louis Jones, Roy Cole and Jessie Bean?

A. Yes, sir.

Q. You worked there with them at the plant?

A. Yes, sir.

Q. Neither of these three men took any part in that fight?

A. I wouldn't know; I kept on running.

Q. You were there and you testified about seeing signs made?

A. I was giving account of what I saw while I was there.

Q. You didn't see either one of these defendants do anything there, did you?

A. No, sir, I didn't.

Q. You didn't see them strike anybody or attempt to help anybody, did you?

A. One thing I seen was when Louis Jones gave the signal and said "all right, boys."

[fol. 99] Q. What kind of a signal was that?

A. I reckon that meant for them to come on.

Q. You reckon that meant for them to come on?

A. Yes, sir.

Q. What time of day was it?

A. I wouldn't know exactly. We got off a little before 5:00 and at 5:00 if we wasn't doing much.

Q. Was there a light in the grocery store this side of the railroad track?

A. I didn't pay that any attention.

Q. You didn't pay any attention to that?

A. No, sir.

Q. And Roy Cole came up later?

A. Yes, sir.

Q. Did Jessie Bean come up later?

A. I never did see him.

Q. You didn't see him at all?

A. No, sir.

Q. You did see Louis Jones and you saw him make some kind of a sign you say?

A. Yes, sir.

Q. And it was shortly after that time that Campbell and Otha Williams had a fight?

A. Yes, sir.

Q. You don't know anything about what they were fighting about?

A. L. C. told me they were going to jump us after dinner, going to whip us.

Q. Who is L. C.?

A. L. C. is all I know.

Q. He is not one of the defendants?

A. No, sir, he is not one of them, but he was walking picket.

Q. He was walking picket?

A. Yes, sir.

[fol. 100] Q. You didn't hear either one of these defendants say anything to anybody?

A. No more than Louis when he called the boy and told him he wanted to talk to him.

Q. How did he do that? He just told him he wanted to talk to him?

A. He said "Wait a minute," he wanted to talk to him.

Q. He said "Wait a minute," he wanted to talk to him, and Otha said he didn't have time or something like that and went on?

A. Yes, sir.

Q. Who did that—Louis Jones?

A. Yes, sir.

Q. Did Louis Jones make any effort to stop him?

A. No, sir, he gave the signal for the rest of them to stop them.

Q. Where were the rest of them?

A. Some of them was there—I don't know where the rest were.

Q. Don't you know, as a matter of fact, that you five boys came out and crossed the track that night for the purpose of having a fight with these boys?

A. No, sir, I don't think we did.

Q. And that one of your bunch did kill Campbell?

A. I know that, but we didn't come out for no fight or it would have been more than what it was.

Q. How many of them were there?

A. Four besides myself.

Q. Four beside you and you made five?

A. Yes, sir.

Q. Where do you live?

A. I lived at Sweet Home at that time, but I live here in town now.

Q. How did you go home from the plant?

A. I got the streetcar and got off the streetcar and got a taxi.

[fol. 101] Q. You got the streetcar and got off the streetcar and got a taxi?

A. Yes, sir.

Q. There is an airport bus that comes right by the plant, isn't there?

A. I have to get off and walk and when I get the streetcar, I don't have but a block to walk to the taxi stand.

Q. Where do these other fellows live?

A. I don't know.

Q. You don't know that?

A. No, sir.

Q. Did you have on your overcoat that day?

A. No, sir, I didn't have on my overcoat that day.

Q. Did you have it on your arm?

A. I had a coat on my arm, but I didn't have an overcoat.

Q. What kind of coat was it?

A. A little short coat.

Q. What kind of gun did you have under it?

A. I didn't have any kind.

Q. It was pretty cole, wasn't it?

A. It was pleasant weather, I call it.

Q. You weren't wearing your coat, but had it on your arm?

A. Yes, sir, I had it on my arm.

Q. How many knives do you carry, Willie?

A. I don't carry any.

Q. You don't carry a long, dark soldier's knife?

A. No, sir, I don't have one.

Q. Don't you carry what you boys call a "hog billed knife"?

A. No, sir.

Q. You never did put your gun in Roy Cole's locker?

A. No, sir, I always put it in my own. I didn't have one.

Q. Oh, you didn't have one?

A. No, sir.

[fol. 102] Q. Was there a light on the streetcar when you went up and got on the car?

A. I didn't pay it any attention. I just run and got on the streetcar.

Q. Was it clear or raining?

A. No, it wasn't raining.

Q. It wasn't raining?

A. No, sir.

Q. You don't know exactly what time it was?

A. No, sir.

Q. You didn't get off until after 5:30?

A. We got off before 5:30. We just piddled around and we take off when we catch the boss out of sight.

Q. When you catch the boss out of sight, then you take off?

A. Yes, sir.

Q. These pickets were walking just to the West of the plant, weren't they?

A. I wouldn't know what you call——

Q. It was between the plant and the railroad track, wasn't it?

A. Yes, sir.

Q. And you went out there and crossed that line instead of crossing the street?

A. That's the only way we had to catch the streetcar.

Q. Couldn't you go across in front of that ice plant?

A. That's just about the same. Anyway, we come in front of the ice plant anyway. We come across just about the front of it any way we come.

Q. You all five came out in a bunch?

A. All came out together.

Q. Then two of you went back to unload the seed, you and Otha Williams?

A. Yes, sir.

Q. And the others waited there for you?

A. Yes, sir, they waited.

[fol. 103] Q. They waited until you came back and you all went over in a gang together?

A. Yes, sir.

Q. And the other three waited for you and Otha Williams before they went across?

Q. How long did it take to unload that seed?

A. It didn't take so very long.

Q. You don't know whey these other three men didn't go on home instead of waiting for you?

A. I reckon cause we all worked together is the only reason I can say.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. You say L. C. Johnson was walking picket down there?

A. Yes, sir.

Q. None of these three defendants were walking picket?

A. I didn't see any.

Q. Where you saw Louis Jones when he give the signal with his hands and said "Come on, boys," that wasn't the picket line, was it—this was on past where the picket line was?

A. Yes, sir.

Q. The picket line was on the East side of the railroad track?

A. It was on this side, right on that side of the railroad. The railroad runs this way, (indicating) and the picket line was over here (indicating).

Q. That would be East?

A. Yes, sir.

Q. And these boys were on the West side?

A. Yes, sir.

Q. And that is where the disturbance took place, on the West side?

A. Yes, sir.

[fol. 104] Q. And L. C. Johnson was the one that was walking picket?

A. Yes, sir.

Mr. Robinson: That is all.

Witness excused.

[fol. 105] Willie Johnson (C. M.), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is Willie Johnson?
A. Yes, sir.
Q. Where do you work Willie?
A. At the Southern Cotton Oil Company.
Q. You work at the Southern Cotton Oil Company?
A. Yes, sir.
Q. Were you working at the Southern Cotton Oil Company last December when the men went out on strike down there?
A. Yes, sir.
Q. Did you go out on strike?
A. No, sir.
Q. Did you work down there on the 26th day of last December, the day after Christmas?
A. Yes, sir.
Q. Do you know who else worked there that day?
A. Elvie Washington, Willie Brown, Otha Williams and Lawrence Cross.
Q. And yourself?
A. Yes, sir.
Q. That made five?
A. Yes, sir.
Q. Did you all leave at the same time that evening?
A. No, sir.
Q. How did you leave?
A. Me and Elvie Washington and Lawrence Cross walked out, and Otha Williams and Willie Brown had to unload a truck.
Q. Two of them unloaded it?
A. Yes, sir.
[fol. 106] Q. Did you stand there on the corner while they were unloading the seed?
A. Yes, sir.
Q. Who did you see?
A. Roy Cole, Jessie Bean and Bishop Jackson.
Q. You saw Roy Cole, Jessie Bean and Bishop Jackson. Those were the three you recognized?

A. Yes, sir.
Q. Where did you see them?
A. They were standing across the street in front of me.
Q. East from where you were?
A. Yes, sir.
Q. Is that the way you went to catch the streetcar?
A. Yes, sir.
Q. When Willie Brown and Otha Williams came out, what did you do?
A. We started on across the track to catch the car and one of the boys told Otha Williams he wanted to talk to him, and Otha told him he didn't have time, he had to go home, and kept walking on, and Robert Brooks ran up behind me and caught me behind the waist——

Mr. Schoggen: I object to that, if the Court please.
The Court: Objection sustained.
Mr. Robinson: I want to show the entire transaction.
The Court: I think you have limited yourself by the language of your information. It will be excluded.
The State objected to the above ruling of the court and at the time asked that its exceptions be noted of record, which was accordingly done.
Mr. Robinson: I want to show what the witness would answer.

(Thereupon, the court and counsel retired to chambers where the following proceedings were had:)

[fol. 107] The Court: You have so drawn this information, as far as a violent attack is concerned, that the only attack was upon Walter Campbell and no one else. You are describing an unlawful assemblage that must under the statute culminate in a violence—that is, according to the first portion of Section 2. For you to show that there was violance upon Willie Johnson by Robert Brooks would not tend to show that there was violence on Otha Williams by Walter Campbell. In other words, it would become irrelevant. The only way I could see that that would become admissible would be on the theory that you had made a prima facie case and had already established by evidence that Robert Brooks was one of the conspirators. You haven't connected it that way yet.
Mr. Robinson: We alleged that Walter Campbell was acting in concert with others.

The Court: The reason I am excluding it, you have not laid the foundation as yet to show that Robert Brooks was concerned in a conspiracy. The whole thing is aimed at a disclosure that Otha Williams was prevented from working because Walter Campbell acted in concert with them. That is the point.

Mr. Robinson: We are doing it now. The acts during the course of a conspiracy would be admissible in evidence if the conspiracy was once established. The acts and declarations themselves are necessary sometimes to establish a conspiracy. All acts of conspirators would be admissible if it had been previously shown that a conspiracy existed. The only way we can show that is by the acts themselves and that is what we are trying to do.

The Court: The question is—has this got anything to do with preventing Otha Williams from working?

Mr. Robinson: It shows the assemblage was unlawful.

The Court: I said on the bench that you had limited yourself by the language of the information. The use of force [fol. 108] and violence by Robert Brooks on Willie Johnson would not be germaine to the issue of whether or not Otha Williams was prevented from working by Walter Campbell and others working in concert with him.

Mr. Robinson: It was all part of the same transaction and occurred at the same scene and place.

The Court: I don't believe it is competent and that is my ruling.

The State objected to the above ruling of the Court and at the time asked that its exceptions be noted of record, which was accordingly done.

Mr. Robinson: I want to make my record, if the Court please.

Mr. Robinson: We propose to prove that at the same time and place and as a part of the same scheme and plan, Robert Brooks, acting in concert with Walter Campbell and others, made an attack on Willie Johnson.

(Thereupon, the court and counsel for both the State and defendants returned into open court, where the following proceedings were had:)

Q. Who was it you saw across the railroad track before you crossed the railroad track?

A. Roy Cole, Jessie Bean and Bishop Jackson.
Q. You saw Roy Cole, Jessie Bean and Bishop Jackson?
A. Yes, sir.
Q. Were you over there when the attack was made on Otha Williams by Walter Campbell?
A. Yes, sir.
Q. Did you see that?
A. No, sir.
Q. What did you do?
A. Robert Brooks grabbed me.

The Court: Wait a minute.

[fol. 109] Mr. Schoggen: That is what we objected to, your honor.

The Court: Don't tell about any other fights. Just tell about the fight between Otha Williams and the other man.
Q. What did you do?
A. I run over back to the office. I didn't see anything else.
Q. You ran over to the office of the Southern Oil Company?
A. Yes, sir.

Mr. Robinson: That is all.

Cross-examination.

By Mr. Schoggen:

Q. You didn't see anything that happened after that?
A. No, sir.
Q. The only thing you know about this case here is that you saw Roy Cole, Jessie Bean and Bishop Jackson over there with some other strikers in front of that little store on 9th Street?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. You were over there when they jumped on Otha Williams, weren't you?

A. Yes, sir.

Q. Why didn't you see it?

A. I didn't have time to see it.

Q. You had gone from the plant over there and you ran back over to the plant?

A. Yes, sir.

Q. Now, the picket line was right there by the side of the plant, wasn't it?

A. Yes, sir.

Q. Did you ever see Johnson walking picket?

[fol. 110] A. I didn't see him.

Q. You don't know who was walking picket?

A. No, sir.

Q. The men you saw over on the railroad track, Roy Cole, Bishop Jackson and Jessie Bean, weren't on the picket line?

A. No, sir.

Mr. Robinson: That is all.

Recross-examination.

By Mr. Schoggen:

Q. Who did you say you saw?

A. Roy Cole, Jessie Bean and Bishop Jackson.

Q. You didn't see Louis Jones?

A. No, sir.

Q. You didn't see Louis Jones make any signal or make any sign?

A. No, sir.

Q. All you know is there was a fight that came up between Walter Campbell, one of the strikers, and Otha Williams, a boy who is still working there?

A. Yes, sir.

Q. You didn't see the fight?

A. No, sir.

Q. You don't know who started it, do you?

A. No, sir.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. Why didn't you see it?

A. I was gone. That's the reason I didn't see it.

Mr. Schoggen: I don't think it would be proper, if the Court please, to take his own witness and undertake to cross examine him.

Mr. Robinson: I asked him why he didn't see it. That is not cross examination.

[fol. 111] The Court: Objection overruled.

The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

Q. Did you see Robert Brooks after you got over there?
A. Yes, sir.
Q. Did you see him before you got over there?
A. No, sir.
Q. There were quite a few over there that you didn't see before you got over there?
A. Yes, sir.

Mr. Robinson: That is all.

Witness excused.

[fol. 112] Elvie Washington, (CM), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is Elvie Washington Williams?
A. That's the way they have got it down, but it is Elvie Washington.
Q. Elvie Washington?
A. Yes, sir.
Q. Where do you work?
A. At the Southern Cotton Oil Mill.
Q. Were you working there on the 17th day of last December when some men went out on strike?
A. Yes, sir.
Q. Did you go out on strike?
A. I wasn't there the day they struck—I was in England.

Q. You weren't there the very day they went out on strike, but you were an employee of the company?

A. Yes, sir.

Q. Were you working there on the 26th day of last December?

A. Yes, sir.

Q. Do you know who else was working that day?

A. Lawrence Cross, Willie Brown, Willie Johnson and myself.

Q. And Otha Williams?

A. Yes, sir, and Otha Williams.

Q. There were five of you?

A. Yes, sir.

Q. Did you all leave together that afternoon?

A. We started together and the seed truck came in and Willie Brown and Otha Williams went to unload the truck and we went to the corner and waited on them.

Q. While you were standing on the corner, did you see any strikers across the street?

[fol. 113] A. Yes, sir.

Q. Who did you see?

A. Bishop Jackson and Jessie Bean and—I don't know that other boy's name.

Q. One of these defendants?

A. Yes, sir.

Q. You saw him over there?

A. Yes, sir.

Q. Well, did you all go on across the track?

A. Otha Williams and them unloaded the truck and they come on out and we went on across the street over there.

Q. Where were you going?

A. To the carline.

Q. You were coming West on 9th Street going to the carline?

A. Yes, sir.

Q. Then what happened?

A. One of them called to Otha Williams and told him he wanted to speak to him. Louis is what he called him, and Otha told him he didn't have time, he was trying to get home, he was late, and we went on walking across the railroad track and one of them hit Willie Johnson and he hollered——

Q. Who hit Willie Johnson?

A. That tall boy hit him—I don't know his name.

Q. You don't mean either one of these defendants?
A. Not either one of them. A tall boy hit him.

Mr. Schoggen: I object to that; if the court please.
The Court: Objection sustained.

Q. What happened to Otha Williams?
A. I looked around and this man was coming around me with a club and Otha broke and run.

The Court: You will have to identify the man. Tell who it was.

Q. Do you know who it was?
[fol. 114] A. No, sir, I don't know the man.

Mr. Schoggen: We move to exclude it, if the Court please.
The Court: He must limit it to the attack on Otha Williams. There is no proof that this person is one of the strikers.
Mr. Robinson: Maybe he didn't know him, may it please the Court. You mean a witness can't testify to what he saw if he doesn't know the person's name? He can testify somebody did it.
The Court: It could have been somebody that wasn't connected with this.
Mr. Robinson: I am going to prove that.
The Court: Let's hear it. I might allow the witness to testify to that on the promise that the State is going to connect it up with a conspiracy.
Mr. Robinson: I am going to prove who it was that made the attack and his name is alleged in the indictment.
The Court: If you are going to do that, go ahead and let him testify.
Q. Were you walking with Otha Williams?
A. Yes, sir.
Q. Then what happened?
A. Otha broke and run and this man run in front of ham and said "Don't you run, I got ou".

Mr. Schoggen: That is objected to, unless this witness knows what man it was.
The Court: The State has promised to show it was a man alleged in the information.

Mr. Schoggen: Walter Campbell, but he can't prove it by this witness. This witness says he doesn't know.

The Court: On that promise, the Court is admitting it. [fol. 115] The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

Q. Go ahead.

A. The last thing I heard him say was "Why don't you go on"?—"I ain't bothering you", and I taken out across the street and went down the railroad track.

Q. You say Otha Williams broke and run and this man ran in front of Otha?

A. Yes, sir.

Q. Did you see him hit Otha?

A. No, sir.

Q. What did Otha say to him?

A. He said "Don't you run, I got you" and Otha said "I ain't bothering you, why don't you go on?"

Q. What did you do?

A. I ran across the street and down the railroad.

Q. Why did you run?

A. I didn't want to get a lick myself.

Mr. Robinson: That is all.

Cross-examination.

By Mr. Schoggen:

Q. You say you didn't want to get a lick yourself?

A. I sure didn't.

Q. Hadn't anybody threatened to strike you, had they?

A. No, sir.

Q. So when you get it right down to what you know about it, you saw Otha Williams and Walter Campbell having a fight?

A. I didn't say Otha Williams or who was having a fight.

Q. You didn't work at night?

A. No, sir.

Q. You don't know which one of them started the fight?

A. No, sir. All I know a man run up in front of him with [fol. 116] a stick and said "Don't you run, I got you" and Otha told him "Why don't you go on? I ain't bothering you".

The Court: Now, the person alluded to by this witness will have to be identified by the conversation this witness has just related and the action of running around in front of the man.

Mr. Robinson: I think Willie Brown has already testified to that.

The Court: The Court cannot comment on the testimony. You can pursue it or recall Willie Brown either way.

Mr. Robinson: The Court made the statement that I would have to connect it up that it was Walter Campbell and it is my contention that I have already shown that by the witness, Willie Brown.

The Court: That is a matter for the jury. Go ahead.

Q. That is all you know about it?
A. Yes, sir, that's all I know.

Mr. Schoggen: That is all.

Witness excused.

[fol. 117] Willie Brown (CM), being recalled by the State, further testified as follows:

Redirect examination.

By Mr. Robinson:

Q. Your name is Willie Brown?
A. Yes, sir.
Q. You testified a few minutes ago?
A. Yes, sir.
Q. I believe you testified that you were near the Southern Cotton Oil Company's plant on the evening of December 26, 1945?
A. Yes, sir.
Q. Did you see Walter Campbell strike Otha Williams?
A. Yes, sir, he outrun him and cut him off.
Q. You said Walter Campbell hit Otha Williams with a club?
A. Yes, sir.

Mr. Robinson: That is all.

Recross-examination.

By Mr. Schoggen:

Q. Did you see anybody else hit Otha?
A. No, sir.
Q. Campbell is the only one that struck him?
A. That's all I seen.
Q. And you were there?
A. Yes, sir.
Q. And Otha Williams killed him?
A. I don't know—I wasn't there.
Q. You didn't stay for that?
A. No, sir, I didn't stay.
Q. You left shortly after the fight *out* under way between Otha Williams and Walter Campbell?
A. Yes, sir, I walked on because Cole told me to go ahead on and I didn't stop to hesitate.
Q. You don't really know what did happen after that, do you?
[fol. 118] A. No, sir.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. Did the defendant, Cole, tell you to go on, that they weren't after you?
A. Yes, sir.
The Court: Tell the jury, if you know, just how Campbell went about it when he went to attack Otha Williams. What was said and how did he go about it?
The Witness: He run and cut him off and told him there wasn't no use running and he fired him across the head with a stick.
The Court: That seems to iden*fity* it.

Q. Was Otha Williams running?
A. Yes, sir.
Q. And Campbell cut him off and hit him with a stick?
A. Yes, sir.

The Court: On the question we had up just now, this sufficiently identifies Campbell as the man alluded to by the witness, Washington, and the Court so holds.

The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

Mr. Robinson: That is all.

Witness excused.

[fol. 119] L. C. JOHNSON (CM), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is L. C. Johnson?
A. Yes, sir.
Q. You formerly worked for the Southern Cotton Oil Company?
A. Yes, sir.
Q. Were you working ther- when they went on strike down there on December 17th of last year?
A. Yes, sir.
Q. Did you go on strike with the others?
A. Yes, sir.
Q. Do you remember the day when the trouble occurred and Walter Campbell was killed?
A. Yes, sir.
Q. Were you walking picket that day?
A. Yes, sir.
Q. Who else was walking picket?
A. Me and Brother Russell.
Q. Were you walking picket when this occurred?
A. Yes, sir.
Q. And Russell was walking picket?
A. Yes, sir.
Q. Was anybody else walking picket besides you two?
A. Not then.

Mr. Robinson: That is all.

Cross-examination.

By Mr. Schoggen:

Q. How long had you worked down there?
A. Four months.

Q. Were you working while Willie Brown was working down there?

[fol. 120] A. Yes, sir.

Q. You know Willie Brown who has testified here?

A. Yes, sir.

Q. You were not there at the place where they had this trouble in front of Andrews Grocery on December 26th?

A. No, sir, I was there walking picket.

Q. You were back on the other side of the track?

A. Yes, sir.

Q. You didn't see any of the trouble?

A. No, sir.

Q. Now, you were one of the pickets that changed your shifts down there at the tent where you made headquarters?

A. That's right.

Q. Do you know these defendants here that are charged with encouraging Walter Campbell in preventing Otha Williams from working?

A. No, sir.

Q. Do you know these defendants?

A. Yes, sir, I know them.

Q. All three of them?

A. Yes, sir.

Q. How often would you be around the headquarters there at the tent?

A. I was there every day.

Q. Did you see these defendants there from time to time?

A. Yes, sir, they all would be around, but Louis wasn't there at the time—he was out of town.

Q. He was out of town?

A. Yes, sir.

Q. Did you ever hear either one of these three defendants encourage any acts of violence down there?

A. No, sir, I never did.

Q. What did they do with reference to complying with [fol. 121] the law, if you know? What kind of advice did they give the boys on the picket line? What did they tell them to do?

A. They told them not to carry no weapons or bother nobody.

Q. They told them not to have any trouble.

A. Nobody, and if anybody comes up and says anything to them, to keep walking.

Q. They told you if anybody came up and *siad* anything to you, to keep walking?

A. Yes, sir.

Q. And that was what you did while your were on the picket line?

A. Yes, sir.

Q. Did you ever *seek* Willie Brown with a gun down there?

A. Yes, sir.

Q. Do you know what kind it was?

A. A 45 automatic.

Q. What did he do with it?

A. He kept it in his locker and toted it around every day with a Howard knife.

Q. Who did?

A. Willie Brown.

Q. You have seen him with all those weapons?

A. He took the knife and took some money away from one boy down there.

Mr. Robinson: I object to that, may it please the Court.

The Court: Objection sustained.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

A. As a matter of fact, you went on picket that day at 12:00 o'clock?

A. That's right.

Q. There wasn't but *tow* of you that walked picket at the time?

[fol. 122] A. At a time.

Mr. Robinson: This is cross-examination on a new matter brought out by counsel for the defendants, may it please the Court.

The Court: All right, proceed.

Q. You were not at the tent that morning?

A. Yes, sir.

Q. You were down there when they had the meeting that morning?

A. I don't know nothing about a meeting.

Q. Who was down there when you came down there?

A. I didn't pay it any attention. I come down to relieve the ones walking picket.

Q. You weren't at the tent when they had the agreement about they were gonig to do that afternoon? You knew about it that day at noon and told it, didn't you?

A. No, sir.

Mr. Schoggen: I object to that, your Honor. That is not proper cross-examination.

The Court: Objection sustained and it will be excluded.

Mr. Robinson: No further questions.

Witness excused.

[fol. 123] Otha Williams (CM), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is Otha Williams?

A. Yes, sir.

Q. Where do you work, Otha?

A. At the Southern Cotton Oil Company.

Q. How long have you worked there?

A. Off and on 22 years.

Q. Off and on 22 years?

A. Yes, sir.

Q. Were you working there last December 17th when the men went out on strike?

A. I was, I wasn't at night.

Q. Did you go out on strike?

A. No, sir, I didn't.

Q. Were you working there the 26th day of last December, the day after Christmas?

A. I sure was.

Q. Who else was working that day?

A. Willie Brown, Elvie Williams, Willie Johnson and this other boy—I can't call his name.

Q. Lawrence Cross.

A. Lawrence Cross.

Q. There were five of you working that day?

A. Yes, sir.

Q. Did you leave with the others when you all laid off from work that afternoon?

A. I sure did.

Q. Did you all leave there together?

A. We sure did.

[fol. 124] Q. Did you go back for anything?

A. I didn't get for until I had to go back and unload a truck.

Q. You and Willie Brown?

A. Yes, sir.

Q. How did you unload the truck?

A. The fellow pulled out and couldn't get his truck in reverse and I put it in reverse and turned it around and got out the man's truck and I come out under the suck pipe shed and me and Willie Brown came out together.

Q. To the corner?

A. Yes, sir.

Q. Is that the corner where the Southern Cotton Oil Company's plant is located?

A. Yes, sir.

Q. Is that where the three of them that had worked there that day were?

A. Yes, sir.

Q. Did you see any of the strikers over there before you crossed the street?

A. Yes, sir, I did.

Q. Who did you see?

A. Louis Jones, Roy Cole and this other fellow on the end (indicating one of the defendants).

Q. Jessie Bean?

A. Jessie Bean, yes, sir.

Q. Those men were out on strike?

A. Yes, sir.

Q. They were men who had worked with you at the plant?

A. They didn't work with me.

Q. They worked for the same company, I am talking about?

A. Yes, sir.

[fol. 125] Q. What did you do when you got with the men that had worked that day.

A. I was on my way home.

Q. How were you going to get home?

A. I was on my way to 9th and Thomas to catch the street-car.

Q. Where is 9th and Thomas with reference to the oil mill?

A. About three blocks.

Q. In which direction?

A. Going West on East 9th Street.

Q. Then the streetcar doesn't come all the way down to the plant?

A. No, sir.

Q. In order to catch the streetcar you have to walk up to 9th and Thomas?

A. Yes, sir, I sure does.

Q. Where did you live?

A. I lived at 902 Pulaski.

Q. Is that where you live now?

A. No, sir, I live at 1220 Gaines.

Q. How were you going to get home?

A. I was going to reide the East 9th Street car to 9th and Main and transfer.

Q. You were going to ride the East 9th Street car to 9th and Main and transfer?

A. To the West 9th bus.

Q. You were going to transfer to the West 9th bus and go home that way?

A. Yes, sir.

Q. Is that the way you usually went home?

A. Yes, sir.

Q. You had been doing that for years?

A. Yes, sir, I have.

Q. Then you started to the carline to catch the car to come home?

[fol. 126] A. Yes, sir, I did.

Q. Before you started to cross the track, you saw these three defendants?

A. Yes, sir, I did.

Q. Was anybody else with them?

A. Bishop Jackson was with them.

Q. What happened? Did you go across the track?

A. Yes, sir, I started across and Louis spoke to me and said, "Otha, I want to see you."

Q. That was Louis Jones, one of the defendants?

A. Yes, sir, and I said, "I am in a jurry, you will have to see me some other time. My wife called and wanted me to hurry home," and he said, "You are going to see me now."

Q. He said, "You are going to see me now"?

A. Yes, sir, and I kept going and when I got close to the store, I got licks.

Q. What happened then?

A. The deceased—I was knocked from the sidewalk to the street.

Q. Who hit you?

A. The deceased one. I had four licks across my head before I could raise my hand and I said "What are you hitting me for?" but I didn't understand what he told me.

Q. Had you had any trouble with him?

A. No, sir, I hadn't had any trouble with him. I didn't even know him. He never did tell me what he was hitting me for and it looked like he was going to beat me to death. He knocked my glasses off of my eyes and I opened my knife with my teeth and he and I tied up, and when I got loose, I left him standing in the driveway on his feet.

Q. What did you do then?

A. I run across the street, and as I run across the street, the truck I had loaded came by.

Q. As you were running across the street, the truck you [fol. 127] had loaded came by?

A. Yes, sir, and I caught the side of it and rode it to 9th and Broadway.

Q. You rode the truck to 9th and Broadway?

A. Yes, sir, and just before we got to 9th and Broadway, a fellow came by in an automobile that looked like the state police—it had "Highway Department" on the side and we stopped on 9th and Cumberland and asked him was he an officer, and he said "No." I went back and got on the side of the truck and rode to 9th and Broadway and got off the truck and walked down Broadway to 10th Street and went down 10th Street to Pulaski and went down Pulaski to where I lived.

Q. What did you do after you got there?

A. I called my boss back to the mill and they said he was not there and I called him home three times and I called over to the mill and got Mr. Taylor and he said——

Mr. Schoggen: I object to that.

The Court: Yes, that would be hearsay.

Q. You did get in touch with Mr. Taylor at the mill?

A. Yes, sir.

Q. Did the officers come down to your place?
A. Yes, sir.
Q. And they took you down and put you in jail?
A. Yes, sir.
Q. When did you get out of jail?
A. The 27th.
Q. The next day?
A. Yes, sir.
Q. Where did you go then?
A. To the Baptist State Hospital.
Q. Were you bleeding?
A. Yes, sir, from the nose and ears.
[fol. 128] Q. Was that the result of the blows Campbell had given you the evening before?
A. Yes, sir.
Q. Were you confined there in the hospital as a result of those injuries for several days?
A. For 17 days.
Q. Were you able to work during that time?
A. No, sir.
Q. After that, you went back to work?
A. Yes, sir.
Q. And you are still working?
A. Yes, sir.

Mr. Robinson: That is all.

Cross-examination.

By Mr. Robley:

Q. Who have you talked to about this case?
A. Who have I talked to about this case?
Q. Yes.
A. No one I knows of.
Q. How old are you?
A. 39—soon will be.
Q. How long have you been with the Southern Cotton Oil Mill?
A. Off and on 22 years.
Q. What do you mean by "off and on"?
A. Out of 22 years, I didn't work steady the whole 22 years.

Q. What do you mean by that?

A. I worked two or three years and would lay off and go to some other job and work a while.

Q. Where did you work before you went to work for the Southern Cotton Oil Company the last time?

A. I worked for the Jacksonville Ordnance Plant.

Q. How long did you work there?

[fol. 129] A. A year and six months.

Q. During the war?

A. Yes, sir.

Q. You are 39 years old now?

A. Yes, sir.

Q. You were 36 then?

A. I sure were.

Q. Were you called up for the draft?

A. I sure were.

Q. You didn't go?

A. No, sir, I was disqualified from the army.

Q. Why?

A. I don't understand. They didn't tell me how come they turned me down.

Q. How old were you when you went to work for the Southern Cotton Oil Company?

A. I was a little youngster, ten or eleven years old.

Q. What was your next job after you went to the Southern Cotton Oil Company?

A. Unloading seeds out of boxcars when I got up there.

Q. Where did you work next?

A. I worked for the City one year.

Q. What year?

A. That was the year 1941, I think it was.

Q. Where did you work in 1940?

A. In 1940, I worked, if I makes no mistake, part of 1940 at the Macke Mining Company.

Q. Where did you work in 1939?

A. In 1939, I worked here and yonder—I didn't have no steady job.

Q. Where did you work in 1938?

A. I didn't have no steady job in 1938.

Q. In 1937?

[fol. 130] A. Here and yonder.

Q. 1936?

A. I was piddling around.

Q. 1395?
A. I was at home sick..
Q. 1934?
A. I don't know where I worked in 1934.
Q. In 1933?
A. I couldn't tell you.
Q. In 1932?
A. I still don't know.
Q. 1931?
A. I don't know.
Q. 1930?
A. I worked so many different places, I couldn't tell you where I did work.
Q. 1929?
A. I don't know.
Q. 1928?
A. Piddling around.
Q. 1927?
A. I wasn't here.
Q. Where were you?
A. In McGehee, Arkansas.
Q. Where did you work in 1926?
A. I was in McGehee.
Q. In 1925?
A. I was with my father and mother some place.
Q. In 1924?
A. I was with them.
Q. In 1923?
A. I was with them.
Q. 1922?
A. I was with my parents until a few years ago.
[fol. 131] Q. You were born in 1907?
A. I sure was.
Q. Where were you in 1921?
A. Somewhere around here. My memory is not that long.
Q. Where were you in 1920?
A. Around in Arkansas somewhere.
Q. In 1919, where were you?
A. In 1919, I still wasn't working.
Q. In 1918?
A. Piddling.

Q. As a matter of fact, you haven't worked for the Southern Cotton Oil Company 22 years, have you?

A. Not steady.

Q. Tell me how much time in the past 22 years you have been with the Southern Cotton Oil Company?

A. I have been with them quite a while. As I told you in the beginning, I wasn't with them steady for 22 years.

Q. You mean that 22 years ago, you began working there and you were absent for 20 years and went back?

A. I went to work back longer than that.

Q. How many times have you been arrested?

Mr. Robinson: I object to that, may it please the Court.

The Court: Objection sustained.

Q. I believe you testified on direct examination that you killed Walter Campbell in self defense?

A. I don't know whether I did or not. I don't know whether I killed him or not. I left the man standing on the street. He was standing on his feet in the driveway.

Q. How many times did you cut him?

A. I don't know, sir.

Q. Did you cut him?

A. I imagine I did. I had to do something to get him off of me.

[fol. 132] Q. How much do you weigh?

A. I haven't weighed in quite a while, but the last time I weighed 187 pounds.

Q. What did Walter Campbell weigh?

A. I don't know.

Q. Wasn't he smaller than you?

A. I don't know—I couldn't tell you, because I don't know. I wouldn't know Campbell if he would come up here right now.

Q. After you killed Campbell, what did you do?

A. After I killed Campbell? I can't say whether I killed him or not. I don't know whether I killed him or not.

Q. Were you injured, Otha?

A. I sure was. I laid in the Baptist State Hospital for 17 days and I lost blood all night down in the City Hall.

Q. What color shirt did you have on the day of this killing?

A. I think I had on a blue shirt.

Q. Is there blood on the shirt?

A. I don't know—I had on an overcoat.

Q. Did you bring the shirt into court?

A. I wore it—I had on the same clothes when they picked me up—I never did change clothes.

Q. After you killed Campbell, how far did you walk?

A. I walked from 9th and Broadway home.

Q. How far is that?

A. Nine or ten blocks or more.

Q. Then you went to the jail?

Q. Yes, sir, the plain clothes officers picked me up at home.

Q. You went to jail?

A. Yes, sir.

Q. And you lost blood at the jail.

A. Yes, sir, all night.

Q. Who was your doctor at the jail?

A. There wasn't no doctor at the jail.

[fol. 133] Q. You didn't call one?

A. I couldn't get one—they wouldn't give me one at the jail.

Q. They wouldn't give you one at the jail?

A. No, sir.

Q. When did you go to the hospital, Otha?

A. When did I go to the hospital?

Q. Yes.

A. I went to the hospital on the 27th about 1:00 o'clock—the 27th of December last year.

Q. How did you go down there?

A. A lawyer across the street took me in his automobile.

Q. Who paid your hospital bills?

A. The Southern Cotton Oil Company.

Q. You didn't pay it?

A. I was disabled to pay it.

Q. You were injured, were you, when you went to the hospital?

A. I sure was.

Q. After you killed Campbell, you were injured?

A. I don't know whether I killed Campbell, or not.

Q. He is not living?

A. Someone else could have done it—it didn't have to be me.

Q. After you went to the hospital, how long was it before a doctor treated you?

A. It was the next day. Dr. Shuffield treated me at the Baptist Hospital.

Q. How soon after you arrived at the hospital?

A. I guess about an hour after I arrived.

Q. You were in the hospital 17 days?

A. I were.

Q. During the 17 days you were in the hospital, was there ever one day you had as much as one degree of temperature above or below normal?

[fol. 134] A. I don't know, sir. I don't know what the doctors' and nurses' thermometer showed, but I know I suffered.

Q. You were suffering?

A. I know I suffered.

Mr. Robley: That is all.

Witness excused.

[fol. 135] Bishop Jackson (CM), a witness called by the State, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name is Bishop Jackson?

A. Yes, sir.

Q. Bishop, were you working at the Southern Cotton Oil Company on the 17th day of last December, the time the men went out on strike?

A. Yes, sir.

Q. Did you go out on strike?

A. Yes, sir.

Q. Did the strikers put up a tent as headquarters near the Company's plant down there?

A. Yes, sir.

Q. On the 26th day of last December, the day after Christmas, did you go down to that tent that morning?

A. Yes, sir.

Q. How did you get down there?

A. I was standing on 9th and Main and a boy come down there and asked me to go down there with him in

a car and I went with him. He said he heard the oil mill was going to start the next day and he wanted me to go with him.

Mr. Schoggen: I object to that, your Honor.

The Court: Objection sustained.

Q. Did you see Jessie Bean down there that morning?

A. Yes, sir.

Q. What about Roy Cole?

A. He was not there. I didn't see him.

Q. What position did Jesse Bean hold in your union?

A. I don't know. He was one of the officers.

[fol. 136] Q. Was Louis Jones one of the officers?

A. Yes, sir.

Q. Did those two defendants say anything with reference to what they were going to do that afternoon?

A. Yes, they said they were going back down there at 12:00 o'clock.

Mr. Schoggen: We object to that, if the Court please.

The Court: He confined it to these two defendants. The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

A. He said they were going to talk with them about 12:00 o'clock and see about getting them to quit and if they didn't, what they would do.

Q. Were they going to whip them?

A. Yes, sir.

Q. Was that when they were supposed to get off from work that afternoon?

A. They was supposed to go down at 12:00 o'clock and talk with them.

Q. When were they going to do the whipping?

A. They didn't say when they was going to do the whipping.

Q. You left there that morning?

A. Yes, sir.

Q. Did you go on back home?

A. Yes, sir.

Q. On West 9th Street?

A. Yes, sir.

Q. Did you go back down there that afternoon?

A. Well, I was on my way to eat and I met Campbell on 9th and Main.

Q. You met Walter Campbell on 9th and Main?

A. Yes, sir, sitting on a streetcar and he asked where I [fol. 137] was going and I told him I was going to eat supper. He said he was going down to the tent and asked me to go with him.

Q. That was late in the afternoon?

A. Yes, sir.

Mr. Schoggen: We object to that conversation.

The Court: Who were you talking to?

Witness: To Campbell.

Mr. Robinson: I will withdraw the question, may it please the Court.

Q. You did see Campbell there?

A. Yes, sir.

Q. Did you and Campbell get on the streetcar?

A. Yes, sir.

Q. And went to the end of the streetcar line?

A. We went to 9th and Thomas where it turns.

Q. Where did you go from there?

A. I went on to the Cafe.

Q. Did Campbell go on to the cafe with you?

A. Yes, sir.

Q. Did he wait there until you got through eating?

A. Yes, sir.

Q. Then where did you go?

A. When I got through eating, we walked out and I said, "I have got to go home" and he said, "No, we will go on down here."

Q. You can't tell about any conversation. When you got through eating, you went where?

A. I went as far as the railroad with Campbell.

Q. When you got to the railroad, you stopped on the corner?

A. Yes, sir.

Q. Is the Southern Cotton Oil Company's plant directly across the street from where you were?

A. Yes, sir, angling across the street.

[fol. 138] Q. You waited on the corner?

A. Yes, sir.

Q. Did Campbell leave?

A. Yes, sir, he went on down to the tent.

Q. Who was there on the corner with you while Campbell was gone?

A. Louis Jones and two or three others—I forget their names.

Q. Louis Jones and two or three others?

A. Yes, sir.

Q. You waited there until Campbell came back?

A. Yes, sir.

Q. Who came back with Campbell?

A. Robert Brooks.

Q. When did Cole come up?

A. Cole came up later.

Q. Cole came up later. That is the defendant, Roy Cole?

A. Yes, sir.

Q. All right, now, Campbell and Brooks came on back?

A. Yes, sir.

Q. Where was Jessie Bean at that time?

A. He was down the street about half a block away.

Q. He had been up there?

A. He had been up there, but he had gone.

Q. Was he up there?

A. Yes, sir.

Mr. Schoggen: I submit that is very, very leading.

The Court: Yes, it is leading.

Q. Did you see these boys come out of the plant that had not gone out on a strike?

A. Yes, sir.

Q. What did they do?

A. They came up to where you catch the bus and stood there a few minutes and came across the street.

Q. They were coming toward the car line?

[fol. 139] A. Yes, sir.

Q. The very carline you came up on?

A. Yes, sir.

Q. Was anything said:

A. One of the boys said, "We want to talk to you."

Q. Do you know which one it was that said that?

A. No, sir.

Mr. Schoggen: We object to that, if the Court please.

The Court: Objection sustained.

A. The boy walked on and said "We don't have time to talk."

Q. That is what the boys that came from the mill said—they said "We don't have time to talk?"

A. Yes, sir.

Q. Did they continue on walking?

A. Yes, sir.

Q. What happened then?

A. Later they went into a tussle.

Q. Did the group there follow them up?

A. No, sir, after they went into a tussle, I passed on by them and caught the car.

Mr. Schoggen: We object to that.

The Court: Connect it up with the charge in the information, if you expect to do so. Who was it that was in this contest or tussle?

Mr. Robinson: I don't propose to prove that by this witness.

The Court: Is that what you expect to prove by other witnesses?

Mr. Robinson: No, sir that is my last witness.

The Court: There wasn't any other tussle there but the one between those two?

[fol. 140] Witness: That is the only one I seen.

The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

Mr. Robinson: No further questions.

Cross-examination.

By Mr. Schoggen:

Q. If I understand you correctly, in answer to the question by the court, you mean to testify that the tussle you saw was between Otha Williams and Walter Campbell?

A. Yes, sir.

Q. You didn't see either one of these defendants in any tussle?

A. No, sir, I did not.

Q. You didn't see them encouraging any tussle?

A. No, sir, I did not.

Q. When you were down there that morning at the tent, was Campbell there then?

A. No, sir, he wasn't there.

Q. He wasn't there?

A. No, sir.

Q. He wasn't present and down there when they were talking about planning to talk to the boys who were still working?

A. No, sir.

Q. As far as you know, he didn't know anything about that?

A. As far as I know.

Q. What time of day did you first run into Campbell?

A. I imagine it was around 4:00 or 4:30.

Q. That was the first time you had seen him all day?

A. Yes, sir.

Q. You say these men that were still working, Otha Williams and the others of the bunch, all came out together [fol. 141] from the plant?

A. They all came across the street together.

Q. They all came across the street together?

A. Yes, sir.

Q. I understood you to say they first stopped over where the bus stopped.

A. That's right.

Q. You don't know why they didn't catch the bus there?

A. No, sir.

Q. But they didn't catch the bus and came on across the street to where the strikers were?

A. Yes, sir, across to the carline.

Q. Across to the carline?

A. Yes, sir.

Q. That tussle you spoke about between Otha Williams and Walter Campbell was right in front of Andrews' Grocery Store there, which is something like 100 yards West of the railroad track and it is quite a little distance from the Southern Cotton Oil Mill's plant, isn't it?

A. Yes, sir.

Q. Something like a block or a half of a block?

A. About half a block.

Q. About half a block?

A. Yes, sir.

Q. What time of day was it when this tussle occurred between Walter Campbell and Otha Williams?

A. I don't know—it was about dark, but it wasn't so you couldn't see good.

Q. It wasn't pitch dark?

A. No, sir.

Q. But it was getting dark or dusk at that time?

A. Yes, sir.

Q. Where did you live at that time?

[fol. 142] A. On 9th and Pulaski—1306 West 9th Street.

Q. 1306 West 9th Street?

A. Yes, sir.

Q. Did you go down there to that tent frequently, Bishop?

A. I was down there two or three times.

Q. You were not working at the time—you were out on strike?

A. Yes, sir.

Q. Jessie Bean was one of the officers in the local union?

A. Yes, sir.

Q. Did you ever hear him and the other boys in charge of the picketing down there caution all the pickets to be careful and not have trouble with anybody?

A. I heard them tell them not to carry any knife or any kind of weapon.

Q. You heard them tell them not to carry any knife or any kind of weapon?

A. Yes, sir.

Q. They had a copy of this Act 193 posted in the tent down there?

A. I haven't been down there at night.

Q. You haven't been down there at night?

A. No, sir.

Q. Well, you have been down there in the daytime?

A. Yes, sir.

Q. And you know, as a matter of fact, they were all warned by these defendants not to have any trouble?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. Did you ever at any time hear either one of these defendants encourage Campbell or anybody else to have any trouble?

A. No, sir, I did not.

Q. Now, Bishop, in coming away from the plant down [fol. 143] there when these workers were leaving, they could cross to the North side of 9th street without crossing any picket line, couldn't they?

A. Yes, they could.

Q. And in that way they could have come up to the carline without crossing any picket line or encountering these strikers, couldn't they? I mean without running into the strikers—the strikers were over in front of Andrews' grocery store?

A. They were at the railroad there.

Q. At the railroad?

A. Yes, sir.

Q. And these boys all came out together?

A. They all came across together.

Q. They all came across together?

A. Yes, sir.

Q. Did you see three of them wait there on the other side of the railroad track while Willie Brown and Otha Williams went back to unload some seed?

A. I didn't pay that any attention.

Q. You didn't pay that any attention?

A. But I knew they all came across together.

Q. You know they all came across together?

A. Yes, sir.

Q. You are also indicted and charged with violation of this Act, aren't you, Bishop?

A. I don't know what I am charged with.

Q. You just know you are charged with something?

A. Yes, sir.

Q. Anyway, you are a defendant and your case was set for today also?

A. I don't know—I had a subpoena—I guess it was.

[fol. 144] Q. You are at liberty now under bond on that charge, aren't you?

A. I suppose so.

Q. When was the last time you talked to Mr. Robinson about this matter?

A. I haven't talked with him but twice since it happened.

Q. Have you talked with him since the last trial?

A. No, sir, I haven't.

Q. You came in and testified for the state at the last trial, the last time these boys were tried?

A. I think so—that was back in the winter.

Q. You were called by the state as a witness against these boys at that time and testified for the state?

A. Yes, sir.

Q. As a matter of fact, you don't expect the state to ever try you, do you?
A. I don't know, sir.
Q. Well, at least you hope they don't, don't you?
A. Sure.

Mr. Schoggen: That is all.

Redirect examination.

By Mr. Robinson:

Q. You say you were down at the tent that morning?
A. Yes, sir.
Q. When these defendants here, Louis Jones and the others, were in a discussion and were talking about talking to the men that were working?
A. Yes, sir.
Q. And they agreed that if they didn't talk right, they were going to whip them?
A. Yes, sir.
Q. With *er*ference to going to the car track, is there any [fol. 145] way those men that were working could have gone to the carline without passing by where the strikers were waiting for them there?
Q. They couldn't have come any other way.
Q. They had to go up 9th Street?
A. Yes, sir.
Q. That is where the strikers were waiting for*m* tha*m* at the corner of 9th Street and Railroad?
A. That's what I understand.
Q. There wasn't any picket line over where you were?
A. No, sir.
Q. This defendant, Cole, wasn't walking picket?
A. No, sir.
Q. Bean wasn't walking picket?
A. No, sir.
Q. Jones wasn't walking picket?
A. No, sir.
Q. Campbell wasn't walking picket?
A. No, sir.
Q. And the men that were working there at the plant had to come right by where the strikers were waiting there in order to get to the carline?
A. That's right.

Q. They came by across over there and were attending to their own business?

A. They were walking on by, yes, sir.

Q. They didn't speak to anybody?

A. No, sir.

Q. They were going on?

A. Yes, sir.

Q. Until somebody in the strikers' group said something to them?

A. That's right.

[fol. 146] The Court: Tell the jury whether or not Campbell was present at the time you heard this statement made by these defendants?

Witness: No, sir, he was not present.

Mr. Schoggen: As I recall, he previously testified that Campbell wasn't down there at all.

Q. You saw Campbell late that afternoon on 9th and Main?

A. That's right.

Q. And you and Campbell got on the streetcar and went on back down there?

A. Yes, sir, I went to eat and he went to talk to them.

Q. He didn't go down there to eat, did he?

A. No, sir.

Mr. Robinson: That is all.

Witness excused.

[fol. 147] Mr. Robinson: *The State rests.*

* * * * * * *

MOTION FOR DIRECTED VERDICT, DEMURRER TO THE EVIDENCE AND DENIAL THEREOF

Thereupon, the state having rested its case, the following motion was presented to the court in chambers:

Mr. Schoggen: At the close of the testimony on behalf of the State, the defendants, and each of them, demur to the evidence and move for instructed verdicts of not guilty. There is no evidence other than the mere fact that they had a fight that it was the result of a labor dispute or that Wil-

liams was by force and violence prevented from engaging in a lawful vocation; and, second, there is a total failure to prove that Roy Cole, Louis Jones and Jessie Bean in the County aforesaid did on the 26th day of December, 1945, unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage. That would date back to the assemblage where Campbell was killed. The most that could be said by the State on that is there is some testimony that Bean and Louis Jones were up there at the place of the altercation. I don't believe there is any testimony that Roy Cole was there. There is no evidence to connect them, or either of them, with any act of encouragement, promotion or aid. In fact, all of the testimony is to the contrary. It gets down to where the most that can be said for the State's evidence is that at least two of them were there on the street. They haven't proved that Campbell was ever down there at the tents where these defendants or at least part of them were.

The Court: You proved that they were warned not to wear weapons or commit any acts of violence. The State's witness, Bishop Jackson, testified that he was down at the tent where they gathered together and heard two of the defendants, Bean and Jones, make the statement that they were [fol. 148] going to talk to the boys, and if they didn't talk right, they were going to give them a whipping. There was encouragement, as viewed by the State. That is the first element of a conspiracy or agreement which was encouraged by these two defendants, and as far as the culmination is concerned, which is the next ingredient in the unlawful assemblage, Cole walked around with a stick and came up behind these other men and was there at the time of the commission of the very thing the other two men said in the presence of Jackson that would take place.

Mr. Schoggen: There would have to be some connection.

The Court: The connection would have been in the act. He was saying it to somebody—he told it to Jackson. Now there must be some evidence that they co-operated or encouraged in the performance of the ultimate act which the statute makes a part of the assemblage. The court will overrule the motion for a directed verdict and overrules the oral demurrer to the evidence.

The defendants objected to the above ruling of the court and at the time asked that their exceptions be noted of record, which was accordingly done.

* * * * * * *

Thereupon, the defendants, to sustain the issues in their behalf, introduced the following testimony, to-wit:

JESSIE BEAN (COLORED), one of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Schoggen:

Q. Your name is Jessie Bean?
A. Yes, sir.
Q. You are one of the defendants charged here, is that right?
A. Yes, sir.
Q. How old are you, Jessie?
[fol. 149] A. 39.
Q. You are 39 years old?
A. Yes, sir.
Q. Where do you live, Jessie?
A. In the East end of town, right at the airport.
Q. Where do you work?
A. For the Hamilton Stave Mill.
Q. You work for the Hamilton Stave Mill?
A. Yes, sir.
Q. Did you formerly work for the Southern Cotton Oil Company?
A. Yes, sir.
Q. How long did you work for the Southern Cotton Oil Company?
A. About 14 years—I started in 1931.
Q. About 14 years.
A. Yes, sir.
Q. Were you with the others who went out on strike there on December 17th last year?
A. Yes, sir.
Q. About how many of your organization went out on strike, Jessie?
A. About 112.

Q. About 112?
A. Yes, sir.
Q. And how many remained on the job?
A. Five.
Q. Five?
A. Yes, sir.
Q. Now, do you have any official position with the local union?
A. No, sir, I was just appointed on the committee to negotiate a contract.
Q. You were on the appointed committee to negotiate a contract?
A. Yes, sir.
Q. That organization you belong to is a CIO affiliate, isn't it?
[fol. 150] A. Yes, sir.
Q. When you went out on strike there on December 17th, were there any arrangements made about picketing the plant down there?
A. Yes, sir.
Q. What arrangements were made and what did you have to do with it?
A. We had banners to carry.
Q. For the pickets to carry?
A. Yes, sir.
Q. Did you carry a banner?
A. No, sir, just only to help to carry them if someone would be out—I would help carry a banner.
Q. Did you have a headquarters established down there to work from.
A. Yes, sir, we had a fire and a tent back of the Southern Cotton Oil Company.
Q. How far back of the Southern Cotton Oil mill did you have that tent?
A. I would say about a block from the fence.
Q. It wasn't on the Southern Cotton Oil Mill's property?
A. No, sir.
Q. What did you have on these banners?
A. Well, we had 60 cents minimum wage, 8 hours a day. We were asking for a ten percent increase.
Q. Do you mean ten percent or ten cents?
A. Ten cents.
Q. Ten cents on the hour to make it sixty cents?
A. Yes, sir.

Q. And eight hours a day?
A. Yes, sir.
Q. And that was the contract you were trying to get?
A. Yes, sir.
Q. And that is what you had on this banner?
[fol. 151] A. Yes, sir.
Q. What was the purpose of picketing and waving these banners and carrying these banners outside of the plants?
A. That is for public opinion. A guy would come by and see that we was carrying banners trying to get better wages and better conditions.
Q. Jessie, did you stay at the tent a good part of the time?
A. Yes, sir.
Q. Who else would be at the tent from time to time?
A. Just different ones.
Q. Different pickets?
A. Yes, sir.
Q. And others who were on strike, is that what you mean?
A. Yes, they would visit us and help us out.
Q. What do you mean "help us out"?
A. Help us carry the banners if someone would be out.
Q. In other words, they would furnish relief?
A. Yes, and help to keep the fires.
Q. Do you remember the occurrence on the 26th day of December of last year when Walter Campbell was killed by Otha Williams?
A. I heard them say about it.
Q. You didn't see it?
A. No, sir.
Q. That happened where with reference to the railroad and plant there, if you know?
A. Well, no, sir, I do not know.
Q. You don't know?
A. No, sir, I never was up there.
Q. You never was up there?
A. No, sir.
Q. When did you first learn about it, Jessie?
A. Well, I guess it was about 6:00 o'clock.
Q. You learned about it about 6:00 o'clock after it had
[fol. 152] already happened?
A. Yes, sir.
Q. Was it dark then?
A. Yes, sir.

Q. Where were you when you learned about it?

A. At the tent.

Q. Now, it is charged here that you and Roy Cole and Louis Jones, promoted, encouraged and aided an unlawful assemblage up there, as a result of which this fight occurred. Tell the jury whether or not you ever encouraged anybody in any act of violence, Jessie?

A. No, sir, we did not. We was always instructed—in other words, we had a law, a form of that anti-violence law up in the tent and it was read over to us and different ones would read it over and see that they half-way understood it and read it to the others that we were to picket in peace at all times.

Q. Did you ever encourage Walter Campbell in any act of violence?

A. No, sir.

Q. Or anybody else?

A. No, sir.

Q. Did Louis Jones or Roy Cole, as far as you know?

A. No, sir.

Q. You spoke about this anti-violence Act. Who furnished you that Act that was posted in the tent at your headquarters?

A. Mr. Henderson.

Q. Who is Mr. Henderson?

A. That's our director.

Q. CIO director?

A. Yes, sir.

Q. When did he do that?

A. It was on December 17th, the day of the strike.

Q. That is the day you first went out on a strike?

A. Yes, sir. He had us come over to the hall and read it [fol. 153] over to us and gave us one to carry with us and put in our tent.

Q. And Walter Campbell was instructed along with the others, is that correct?

A. Yes, sir.

Q. Did you have any reason or any way to know that he was going to have any trouble with Otha Wililams or anybody else?

A. No, sir.

Q. You didn't know anything about it until it was over with?

A. About 6:00 o'clock.
Q. About 6:00 o'clock?
A. Yes, sir.
Q. Now, you were asking for eight hours a day, is that right?
A. Yes, sir.
Q. What were you working at that time?
A. Sometimes 12 and 16 and 24 hours.
Q. 24 hours?
A. Yes, sir.
Q. 12, 16 and 24 hours?
A. Yes, sir.

Mr. Schoggen: Take the witness.

Cross-examination.

By Mr. Robinson:

Q. Those weeks you worked 24 hours a day, you would make $100 a week?
A. No, sir.
Q. You were making fifty-five cents an hour?
A. Yes, sir.
Q. How much would you make the days you worked 24 hours?
A. (No answer).
Q. You say sometimes you worked 24 hours a day. How much would you make when you worked 24 hours?
A. We got paid by the week.
[fol. 154] Q. You got paid once a week, but you were paid by the hour?
A. Yes, sir.
Q. Those days you worked 24 hours, how much would you earn that day?
A. You can figure it at 55 cents an hour.
Q. 24 hours at 55 cents an hour would be how much?
A. I will have to figure it.
Q. It would be a little over $13.00 wouldn't it?
A. Yes, sir.
Q. Then if you worked six days at that, it would be pretty close to $100 for that week, wouldn't it?
A. I imagine it would.
Q. How often did you make that much?
A. How often?

Q. Yes, how often?

A. I did it pretty often. Lots of times I would get off at 3:00 o'clock and at 12:00 o'clock they would come and get me out of bed.

Q. You would be paid for all of it?

A. Yes, sir, straight time.

Q. On overtime, you would get time and a half?

A. No, sir.

The Court: I am going to have to limit you gentlemen on these collateral matters.

Q. What position did you hold with the union?

A. I was appointed on the committee to negotiate a contract.

Q. You were appointed on the committee to negotiate a contract?

A. Yes, sir.

Q. What were you doing down at the tent?

A. We was down there for keeping the fires and sometimes we would walk picket.

Q. What time did you go down there on the 26ty of December?

A. We went every morning.

[fol. 155] Q. For what?

A. To see if any fire was down and if anyone on the picket line was off, I would go walk.

Q. You went down there every morning?

A. Yes, sir.

Q. You weren't negotiating a contract down in the tent, were you?

A. We was on a strike.

Q. You say your job was to negotiate a contract. Were you negotiating a contract in that tent?

A. Maybe I misunderstood you—I thought you asked me what podition did I hold.

Q. You were negotiating a contract?

A. I say I was on the appointed committee.

—. You were on the appointed committee to negotiate a contract?

A. Yes, sir.

Q. You weren't holding negotiations in the tent, were you?

A. We was on strike down there—that's where we made fires.

Q. For what?
A. To keep warm.
Q. Who?
A. The pickets.
Q. You didn't walk the picket line?
A. If anybody wasn't up there, I did.
Q. You were in charge of the pickets?
A. No, sir, there wasn't anybody in charge. We all was on strike and was trying to keep the picket line going.
Q. Who had charge of the picket line?
A. The whole group was.
Q. Everybody on strike had charge of the picket line?
A. Yes, sir.
Q. Who walked the picket between the railroad on this day, the 26th day of December?
Q. You mean in the evening?
[fol. 156] Q. Yes.
A. L. C. Johnson.
Q. Who put him on there?
A. He put himself on there.
Q. He went to walking picket without anybody telling him to?
A. If there wouldn't be nebody there.
Q. Who else was walking picket?
A. Carl Russell.
Q. Were you walking picket?
A. No, sir.
Q. Why?
A. Because there was two on it.
Q. That is all you ever used?
A. No, sometimes we used more than two.
Q. On this particular day, two men were walking picket?
A. I couldn't tell you who was there at the time.
Q. You weren't walking picket?
A. No, sir.
Q. What were you doing up there?
A. Where?
Q. At the corner of the Southern Cotton Oil Mill where the trouble occurred and where Walter Campbell was killed?
A. I wasn't up there.
Q. Where were you?
A. Down at the tent.

Q. What were you doing at the tent?
A. Keeping the fire down there.
Q. Did you keep the fire down there all day long?
A. Yes, sir, until 11:00 o'clock.
Q. Did you keep the fires?
A. All of us.
Q. Why didn't you come on up there?
[fol. 157] A. Up where?
Q. Where this trouble occurred. You knew it was going to happen didn't you?
A. No, sir, I did not.
Q. You and Louis Jones and the others agreed down there in the tent that that was what you were going to do that afternoon?
A. We had instructions in the tent for them not to have any kind of fight and not to even carry weapons of any kind and we tried to abide by the law.
Q. Abide by the law that if these *d*en didn't quit, you were going to whip them?
A. No, sir.
Q. You say you weren't there?
A. No, sir.
Q. You say you don't know anything about it at all?
A. No, sir, I sure don't.
Q. You were down at the tent?
A. Yes, sir.
Q. Did Campbell come down to the tent a short time before this happened?
A. I didn't see him.
Q. Was Robert Brooks down at the tent?
A. No, sir.
Q. Who else was at the tent?
A. Walter Jackson.
Q. What time was that?
A. I guess right after 5:15.
Q. Walter Jackson was there?
A. Yes, sir.
Q. Who else?
A. That was all—he and I.
Q. What were you doing there?
[fol. 158] A. We were keeping the fires.
Q. What kind of fires did you have?
A. Wood.

Q. Did you just constantly shove wood in the stove?
A. No, sir.
Q. You went down there that morning to see about the fires?
A. We made the fires in the morning.
Q. You were there in the morning—you and Louis Jones?
A. Yes, sir.
Q. Was Roy Cole there?
A. Yes, sir.
Q. Who else was there that morning?
A. I couldn't tell you.
Q. But you remember you three were there?
A. I couldn't tell you just who all was there.

Mr. Robinson: That is all.

Witness excused.

[fol. 159] Louis Jones (CM), one of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Schoggen:

Q. Your name is Louis Jones?
A. Yes, sir.
Q. You are one of the defendants in this case?
A. Yes, sir.
Q. How old are you?
A. I am 44 this last October.
Q. You are 44?
A. Yes, sir.
Q. Where do you live, Louis?
A. I live at 1910 Summit.
Q. What do you do?
A. I works at the Little Rock Furniture Company.
Q. You work at the Little Rock Furniture Company?
A. Yes, sir.
Q. How long have you been working there?
A. I have been working there since September, I think it was.
Q. Did you formerly work for the Southern Cotton Oil Company?
A. Yes, sir, I did.

Q. Louis, how long did you work there?

A. For the Southern Cotton Oil Company?

A. Yes.

A. I worked there about a year—to the day we came out on strike.

Q. When did you come out on strike?

A. We come out on strike on the 17th of September.

Q. How many came out on strike?

A. It was 112 came out.

Q. And left about five in the plant?

A. Yes, sir.

[fol. 160] Q. There wasn't enough left to operate the plant, was there, Louis?

A. No, sir.

Q. Now, Louis, did you have any official position with the organization you belonged to there?

A. Yes, sir, I was appointed chairman of the group.

Q. You were appointed chairman. By "group," you mean the employees of the Southern Cotton Oil Company?

A. Yes, sir.

Q. You were chairman of that group?

A. Yes, sir.

Q. Louis, in regard to the picketing there and the tent and all, you have heard Jessie Bean testify about that?

A. Yes, sir.

Q. Is that substantially correct about where you had the tent and all?

A. Yes, sir that is substantially correct.

Q. Did you have anything to do with keeping the headquarters?

A. No, sir, I didn't have anything to do with keeping the headquarters. They way it was, it was a free issue to everyone and if they would go out, one would relieve the other toting the picket signs, and at that time, I had been gone about a week. I left the night of the 17th. I got a message that afternoon that I lost my mother at Clarksdale, Mississippi, and I went down there that night and I came back on the 26th of December.

Q. You came back on the 26th of December, the day this trouble occurred?

A. Yes, sir. I got in here between 6:30 and 7:00 o'clock that Monday morning.

Q. Did you go down to the tent there?

A. When I got off the bus, I called Mrs. Morris at the office and she told me to go on down and help the boys out. It was pretty cold.

[fol. 161] Q. It was pretty cold?

A. Yes, sir.

Q. What kind of fires did you have down there?

A. We would buy wood and build a fire.

Q. Did you have a stove?

A. Yes, sir, had a heater. We would make coffee for the walkers and sandwiches.

Q. Did you see this fight between Walter Campbell and Otha Williams?

A. No, sir, I didn't see it. I was at least a half block from where the fight was at the time it happened.

Q. Which way?

A. Just across the street in front of the ice plant. Russell was toting pickets that afternoon and I had been on that day and I stayed on the line the balance of the evening and at 6:00 o'clock these men was supposed to change and there wasn't no one to relieve him and I taken his place.

Q. Do you know when this trouble occurred over there?

A. No, sir, I didn't. It was so dark, you couldn't see what was happening. You could just see the men together.

Q. Had you seen the five employees come out of the plant?

A. Yes, sir, I saw them.

Q. How did they ordinarily leave there—by bus or did they go up to the streetcar across the track?

A. Usually I hadn't paid any attention to how they had been leaving, but usually at the time we was working, we would come out and catch the bus on the corner.

Q. The airport bus?

A. Yes, sir. I hadn't been down there before the strike.

Q. You had been away up until that day?

A. Yes, sir.

Q. You know Walter Campbell?

[fol. 162] A. Yes, sir, I knew him.

Q. He was on strike too, wasn't he?

A. Yes, sir.

Q. Now, you are charged here with having promoted, encouraged and aided him in an unlawful assemblage. Did you ever talk to Walter Campbell about doing any unlawful act?

A. No, sir, I didn't have that much to say to him, and that day previously, I didn't see him previously.

Q. All during the 26th day of December, you hadn't seen him?

A. No, sir, I had not been there but once and that was in the morning.

Q. Did you see him that evening about 5:30 or 6:00 o'clock?

A. I saw him off at a distance. I wasn't close enough to say anything to him. I was on picket when he come along and when he crossed the street going on down the railorad.

Q. As chairman of your group, did you give the pickets any instructions about how they should conduct themselves on the picket line?

A. Yes, sir, it was given before I left and that morning when I come back, I was still telling them. There wasn't anyone at the tent that morning but Walter Jackson and Jessie Bean was there. He had to come down town to the labor office.

Q. You mean to tell the jury you did not promote, encourage or aid in any unlawful actions?

A. No, sir, I did not.

Q. On the contrary, you tried to avoid it?

A. Yes, sir.

Q. Did any of your pickets on strike carry knives?

A. No, sir, they was advised over and over — not carry any kind of weapons.

Q. By whom were you advised?

[fol. 163] A. By Mr. Henderson and Mrs. Morris and also Mr. Stevens.

Q. Did you have pointed out to you the provisions of this anti-violence Act you are charged with violating?

A. Yes, sir, after they read it, they announced it and told us how to do and act on the line.

Q. And you passed that information on to your other fellow workers?

A. Yes, sir.

Q. And you mean to tell the jury you did not encourage Campbell or anybody else?

A. No, sir, no one at all.

Q. Did you have any reason to believe there was going to be trouble there that afternoon?

A. No, sir, I didn't have the least idea there was going to be any trouble.

Q. You were over across the street by the ice plant?
A. Yes, sir.

Mr. Schoggen: Take the witness.

Cross-examination.

By Mr. Robinson:

Q. The only thing you were going to do was just whip them. Is that right?
A. Not as I knows of.
Q. And they all got away but Otha and he didn't whip so easy. You say you had just come from Clarksdale, Mississippi?
A. I had, yes, sir.
Q. What time did you leave from down there?
A. Sunday evening.
Q. Sunday evening what time?
A. I left there about 8: o'clock Sunday evening.
Q. About 8:00 o'clock Sunday evening?
A. Yes, sir.
[fol. 164] Q. On the bus?
A. Yes, sir.
Q. You rode the bus all night long?
A. No, sir, I got in Memphis about 10:00 or 11:00 o'clock and left out of Memphis about 1:30 or 2:00 o'clock—I don't know the exact time.
Q. You got in here between 6:00 and 7:00 o'clock in the morning?
A. Yes, sir.
Q. You didn't go home then?
A. Yes, sir, when I got off the bus, I went home and changed clothes.
Q. When was it you called up about the strike?
A. When I got off the bus, I went in the bus station and called.
Q. Before you did anything else?
A. Yes.
Q. Who did you call?
A. Called the office—Mrs. Morris.
Q. What was the purpose in calling there?
A. To see how they were getting along and if they was still carrying pickets.

Q. You were very much interested—you were chairman of the strike?

A. Yes, sir.

Q. You called the CIO headquarters?

A. Yes, sir.

Q. That was the first thing you did when you got off the bus?

A. Yes, sir.

Q. Then you went on home?

A. Yes, sir.

Q. What did you do at home?

A. Changed clothes.

Q. You changed clothes?

A. Yes, sir.

[fol. 165] Q. And then you went on down to the tent?

A. Yes, sir.

Q. You had been up practically all night?

A. Yes, sir.

Q. But you didn't go to bed or anything like that?

A. No, sir, not that day.

Q. You didn't go to bed that day at all?

A. No, sir.

Q. You had been traveling and had been up all night long and you went home and changed clothes and went down to the tent?

A. Yes, sir.

Q. You didn't go to bed at all?

A. No, sir.

Q. Why didn't you go to bed?

A. I wasn't sleepy.

Q. You had been up all night long, but you still were not sleepy?

A. No, sir.

Q. You didn't have any other motive in not going to bed except that you just were not sleepy?

A. No, I wasn't sleepy.

Q. What time did you get to the tent?

A. Between 9:30 and 10:00 o'clock.

Q. Was anybody there at that time?

A. Walter was there making a fire and shortly after we got there, Jessie came in.

Q. Jessie who?

A. Jessie Bean. He had to go to town to the labor office and I said "Who is on the picket line"; and he said

"Brother Humphrey." and he said he hadn't had any coffee and I could go and relieve him.

Q. There were 112 of you out on strike?

A. Yes, sir.

Q. You had been up all night long, but you couldn't get [fol. 166] anybody else to tote the pickets. You said Jackson was there?

A. Yes, sir.

Q. And Bean was there?

A. Yes, sir.

Q. And wouldn't either of them walk it?

A. They had been walking.

Q. How long did you stay around there?

A. Just a few minutes.

Q. Where did you go then?

A. Back on the picket line.

Q. How long did you stay there?

A. All day.

Q. All day?

A. Yes, sir.

Q. All day long?

A. Yes, sir.

Q. Until late that evening?

A. Yes, sir.

Q. You weren't walking picket?

A. I wasn't toting a banner. As they would come in, they was supposed to be relieved and if there wasn't anybody there, I would take the sign and tote it until somebody would come.

Q. As a matter of fact, you and Jessie Bean were the main instigators and had a conference in the tent that morning and you agreed that you were going to talk to those men and if they wouldn't agree to quit, you were going to whip them?

A. No, sir.

Q. You were the one that called Otha Williams and told him you wanted to talk to him?

A. I didn't say anything.

Q. And he told you he was going home and you said "All right, boys" and gave a signal for them to gather in and [fol. 167] they swarmed in like blackbirds?

A. No, sir.

Q. And Walter Campbell went in front of Otha Williams. You saw that, didn't you?

A. No, sir.

Q. Where was Cole?

A. I don't know where Cole was. I didn't even see him, because that time of the evening was dark.

Mr. Robinson: That is all.

Witness excused.

[fol. 168] Roy Cole (CM), one of the defendants, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Schoggen:

Q. You name is Roy Cole?

A. Yes, sir.

Q. Where do you live?

A. 902 Townsend.

Q. You are one of the defendants here?

A. Yes, sir.

Q. How old are you, Roy?

A. 41.

Q. Where do you work now?

A. Swift Cotton Oil Company.

Q. Did you formerly work for the Southern Cotton Oil Company?

A. Yes, sir.

Q. About how long did you work for the Southern Cotton Oil Company?

A. Since 1922.

Q. Since 1922, about 24 years?

A. Yes, sir.

Q. Have you worked there continuously since that time?

A. No, sir, I haven't. It just runs by season and I work there in the Fall of the year.

Q. You were with the other 112 that went out on strike on the 17th of December of last year?

A. Yes, sir. I was.

Q. Did you have occasion to be around the strike headquarters at the tent down there?

A. Well, Yes, sir, I would come around there practically every morning.

Q. Why?

[fol. 169] A. To see if there was any boys there to tote the banners and if there wasn't, I would carry it myself.

Q. You would help out?

A. Yes.

Q. You weren't working anywhere at the time, you were on strike?

A. Yes, sir.

Q. You are charged here, Roy, that you and Louis Jones and Jessie Bean promoted, encouraged and aided Walter Campbell in an unlawful assemblage, as a result of which Walter Campbell was killed by Otha Williams. Did you ever do anything to encourage Walter Campbell in doing any unlawful act?

A. No, sir, I didn't. I never seen Campbell from the 17th of December until 5:30 on the 26th of December.

Q. You *d*adn't seen him in the meantime at all?

A. No, sir.

Q. Were you down there at the tent on the 26th?

A. I was down there around 7:30.

Q. Was Campbell there?

A. No, sir, he wasn't.

Q. Where were you, Roy, when this fight came up between Walter Campbell and Otha Williams?

A. I was at the corner when they came out.

Q. When who came out?

A. When these other strikers came out.

Q. When the workers came out?

A. When the workers came out, yes, sir.

Q. That was Otha Williams and the other bu-ch with him?

A. Yes, those five boys.

Q. You were at the corner. What corner do you mean?

A. Right at the picket line.

Q. What were you doing there?

A. Well, I had to go up there every evening to see [fol. 170] whether the boys were there with the banner or not and if any of them wanted to go get coffee or get something to eat, I would relieve them until they come back.

Q. What was the first thing that attracted your attention to a difficulty between Walter Campbell and Otha Williams?

A. Well, I don't know. When they come across there, I heard one of the boys tell them he wanted to speak to them and one said they didn't have time. Who it was, I don't know, and they turned and walked up the street. There

was seven or eight together. And when they got up in front of the store, they started fighting.

Q. Could you tell anything about who started the fight?

A. No, sir, it was about dark.

Q. How far away were you Roy?

A. I was across the street over there by the oil company, across the street from Andrews' store.

Q. Did you walk on up there?

A. I walked up across the street where I could see them fighting, but I didn't know who it was.

Q. Did you have any conversation with Willie Brown about him going on?

A. Yes, sir, I did.

Q. What did you tell him?

A. He had a coat on his arm and had his hand under his coat like this (indicating) and he kept making an attempt like he had a gun or something—I don't know whether he did or no—and I told him "Willie, if I was you, I would go on—I wouldn't be in this mess".

Q. Did you have anything to say to anybody else?

A. No, sir, I didn't.

Q. Do you know whether or not Willie Brown keeps a gun all the time?

[fol. 171] A. I kept his gun in my locker two or three times.

Mr. Robinson: I object to that, may it please the Court.

Mr. Schoggen: I think it is competent. Willie Brown testified he didn't have a gun.

The Court: Was the foundation laid to interrogate the witness on this question? I don't think there was any definite foundation laid to impeach the witness, Willie Brown, on that point. Objection sustained.

The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

Q. That was the reason you told him to go on, because you thought he had a gun with him?

A. Yes, sir.

Q. And he did go on?

A. Yes, sir.

Q. What did you do, Roy?

A. I come on down by the ice plant then.

Q. You mean to tell the jury you never did encourage any law violation whatever?

A. No, sir, I never did.

Q. What were the instructions of your officers down there with reference to violence in connection with the picket line on strike?

A. Mr. Henderson and Mrs. Morris and Mr. Stevens always told us from the beginning to picket peacefully and don't have no kind of violence.

Q. Did you and the others, who were more or less leaders in the movement, pass that information on to the rest?

A. Yes, sir.

[fol. 172] Q. Something has been said about a stick you had with you?

A. Well, I had a walking cane.

Q. You had a walking cane?

A. Yes, sir.

Q. What kind of walking cane was it?

Q. Well, I don't know—about an ordinary cane like.

Q. Why were you carrying it?

A. Well, I just carried it all the time. I sprung my ankle once or twice and carried a stick along with me.

Q. You were not carrying it as a weapon?

A. No, sir, I never did think about nothing like that.

Mr. Schoggen: Your witness.

Cross-examination.

By Mr. Robinson:

Q. Roy, what were you doing down there at all?

A. Oh, I would go—down where?

Q. At that corner at that time?

A. I would go down there every evening.

Q. For what?

A. To relieve the boys on the picket line.

Q. You hadn't been on the picket line any that day?

A. No, sir, I hadn't. It was two or three days I didn't walk, but I had been there to see whether they was there or not.

Q. You saw Louis Jones there?

A. Yes, sir.

Q. You saw Jessie Bean there?

A. I met Jessie Bean when I was coming down there. I was coming down to the picket line and Jessie Bean was going back.

Q. Where this trouble occurred, there wasn't any picket line over there?

[fol. 173] A. I didn't see Jessie Bean over there. I met him a block away from there.

Q. You were right behind Walter Campbell and Robert Brooks?

A. I don't know about that—I didn't see them.

Q. Did you see them when they got in front of you?

A. No, sir, when I got there, they was there.

Q. What kind of stick did you have?

A. An ordinary walking stick.

Q. You say you sprained your ankle?

A. Yes, sir.

Q. When?

A. I don't know, once or twice.

Q. About 15 years ago?

A. I don't know.

Q. You didn't have a sprained ankle at the time this occurred. You don't ordinarily walk with a walking stick?

A. When something was wrong.

Q. There wasn't anything wrong with you then?

A. My ankle was hurting.

Q. The truth about it is you were standing there when those boys started across the street.

A. I had just walked up there.

Q. You had just walked up there?

A. That's right.

Q. And they were walking West going toward the carline?

A. That's right.

Q. They were minding their own business?

A. That's right.

Q. And you heard one of them in your group of strikers say, "Wait a minute, we want to talk to you"?

A. I heard somebody say that.

Q. And Otha Williams said he didn't have time?

A. I don't know who it was, but somebody said they didn't have time.

[fol. 174] Q. And they kept walking and your group went up 9th Street?

A. They all went up 9th Street in a bunch.

Q. You told Willie Brown to go ahead on—that they wasn't after him?

A. Yes, sir, I did.

Q. How did you know they weren't after him?

A. Willie was across the street and they couldn't have been after him with him on one side of the street and *him* on the other.

Q. You know that they didn't object to him working there—you had heard it discussed?

A. They hadn't never said nothing about it.

Q. Answer the question. Didn't you hear them say they didn't object to Willie Brown working because he was on parole from the penitentiary?

A. No, sir, they never said that.

Q. How do you know?

A. Because he was on one side of the street and they was on the other.

Q. You told him to go ahead on that they weren't after him?

A. Yes, that is what I told him.

Mr. Robinson: That is all.

Witness excused.

[fol. 175] Andrew Humphrey (CM), a witness called by the defendants, after being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Robley:

Q. State your name to the jury.

A. Andrew Humphrey.

Q. Where do you live, Andrew?

A. 720 Foster, near the airport.

Q. How old are you?

A. 62.

Q. 62 years old?

A. Yes, sir.

Q. Andrew, have you ever worked for the Southern Cotton Oil Company?

A. Yes, sir.

Q. How long did you work for them?

A. Four years.

Q. Four years?

A. Yes, sir.

Q. Were you working for them in December, 1945?

A. Yes, sir.

Q. Were you working for the Southern Cotton Oil Company on December 26, 1945?

A. I worked for them four years up until the strike come on.

Q. You worked for them four years up until the strike?

A. Yes, sir.

Q. Did you go out on that strike?

A. Yes, sir.

Q. You and how many other men?

A. I can't remember how many went out?

Q. Was there more than 100?

[fol. 176] A. Something like that maybe.

Q. Andrew on the 26th day of December, 1945, that was the day following Christmas, were you walking picket?

A. I walked from 6:00 o'clock until noon.

Q. Then where did you go?

A. I went home and at 3:00 o'clock I went to North Little Rock after me a grate for my coal stove.

Q. Then when did you come back to the Southern Cotton Oil Company or to the picket line?

A. I didn't come back at all.

Q. You never did come back?

A. Not until after the trouble come up.

Q. Were you arrested and thor-n in jail along with these other defendants for violating the law?

A. I sure was.

Q. On December 26th?

A. That's right.

Q. Did you have anything to do with that disturbance?

A. Not a thing in the world—I knowed nothing about it.

Q. You weren't even there?

A. No, sir, my boy was working for the Motor Express Company and he got off and was telling me about it when I come in from North Little Rock.

Q. You left there at noon the day of the difficulty?
A. Yes, sir.
Q. Still you were arrested and thor-n in jail for violating this Act along with these defendants?
A. That's right.
Q. Andrew, have you ever been arrested?
A. Not until then.
Q. Are you a married man?
A. Yes, sir.
[fol. 177] Q. Do you have a family?
A. Yes, sir, I have been married 42 years.
Q. To the same woman?
A. To the same woman.

Mr. Robley: No further questions.

Cross-examination.

By Mr. Robinson:

Q. You are not charged with doing anything?
A. I don't know, sir, I am up here.
Q. You are up here as a witness, aren't you?
A. I guess so.
Q. There is no charge pending against you—it was found that you didn't have anything to do with it down there that evening and that is all there was to it?
A. I—that is what I figured.
Q. However, you did walk picket that day?
A. Yes, sir, I walked from 6:00 o'clock until noon.

Mr. Robinson: That is all.

Witness excused.

[fol. 178] Walter Jackson (CM), a witness called by the defendants, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Schoggen:

Q. State your name?
A. Walter Jackson.

Q. Where do you live?
A. 1009 Epperson, Little Rock.
Q. Where do you work?
A. Swift Cotton Oil Company.
Q. How old are you?
A. 36.
Q. Walter, have you ever worked at the Southern Cotton Oil Company?
A. Yes, sir.
Q. How long have you worked for them?
A. I started to work there in 1928.
Q. You started to work there in 1928?
A. Yes, sir.
Q. And when did you last work for them?
A. In 1945.
Q. Were you there in December 17th last year when they went out on strike?
A. Yes, sir.
Q. Were you one of those employees who went out on strike?
A. Yes, sir.
Q. Why did you go out on strike, Walter?
A. Why did I go out on strike?
A. Yes.
Q. I was with the group that struck and we all went out on strike—the whole group.
[fol. 179] Q. Did you go out on strike for higher wages and shorter hours?
A. Yes, sir.
Q. What hours had you worked for the Southern Cotton Oil Company?

Mr. Robinson: I don't see what that has got to do with this lawsuit.

The Court: That is entirely a collateral matter. There was no objection or I would have ruled it out.

Q. You say you were at the picket line on December 26th?
A. No, sir.
Q. That was the day of the difficulty?
A. I was down there about 6:15 that evening.
Q. Was that before or after the difficulty?
A. That was after.

Q. That was after the difficulty?
A. Yes, sir.
Q. Were you in the strikers' tent that day?
A. I was there at 9:30.
Q. You were there at 9:30 in the morning?
A. Yes, sir.
Q. What was your purpose in being in the tent?
A. I made a fire and made some coffee for them.
Q. Did you walk picket there on the 26th day of December?
A. No, sir.
Q. You did not?
A. No, sir.

Mr. Schoggen: That is all.

Cross-examination.

By Mr. Robinson:

Q. You say you were down at the tent at 9:30 that morning?
A. Yes, sir.
Q. Did you walk picket any that day?
[fol. 180] A. No, sir.
Q. You left there at 9:30 and didn't go back to the tent anymore that day?
A. I came back that evening.
Q. What time?
A. It was around 6:15.
Q. I thought you were up there at the place where the trouble occurred?
A. I went up there, but it was later—I don't know what time it was.
Q. You didn't see any of it?
A. No, sir.
Q. You didn't have anything to do with it?
A. No, sir.

Mr. Robinson: That is all.

Witness excused.

Mr. Schoggen: I would like to call Mr. Henderson.
Mr. Robinson: He has been sitting in the court room all day, may it please the Court.

The Court: I imagine his testimony relates to the question of advice?

Mr. Schoggen: It does, your Honor.

The Court: That was allowed to go in because it was not objected to. I don't think he would be a proper witness after he has been sitting in the courtroom and heard the testimony of the witnesses on that very question. The Court will have to exclude him on that ground and that alone. You will be excused.

Mr. Schoggen: With reference to the deposition of Dr. Shuffield by stipulation, Dr. Shuffield was a witness for the defense and had an emergency call at Camden and it was [fol. 181] agreeable to counsel to read his testimony and the testimony was taken down by the court reporter and transcribed by the court reporter.

The Court: You may read it.

Thereupon, the deposition of Dr. Joe Shuffield was read to the jury; said deposition being as follows, to-wit:

"Dr. Joe Shuffield; a witness called by the defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. Robley:

Q. Your name is Dr. Joe Shuffield?
A. That's right.
Q. You are a physician and surgeon of Little Rock?
A. Yes, sir.
Q. Where is your office?
A. 1008 Donaghey Building, Little Rock.
Q. Doctor, how long have you been practicing medicine?
A. I graduated June 6, 1923, and after 2½ years in hospital training, I opened an office.
Q. Are you affiliated with the Baptist State Hospital?
A. Yes.
Q. In what capacity?
A. Chief of Orthopedic surgery or bone surgery.
Q. You have been affiliated with them for what period?
A. Ever since January, 1925.

Mr. Robinson: For the purpose of the record, if these questions are for proving his qualifications, we will admit his qualifications.

Q. Dr. Shuffield, did you in December of 1945 have occasion to examine Otha Williams?

A. Yes.

Q. On what date?

[fol. 182] A. On December 27, 1945.

Q. At what time of day, Doctor?

A. If I remember correctly, it was late in the afternoon—probably 4:00 to 6:00 o'clock. I can't tell you the exact time.

Q. You have before you the record of the Baptist State Hospital, do you not?

A. Yes, sir.

Q. Showing the treatment given to Otha Williams during his tenure there?

A. Yes.

Q. Doctor, what does your record reflect as to the time Otha Williams was admitted to the hospital?

A. 12:55 P. M.—soon after noon.

Q. How soon thereafter did you examine Otha Williams?

A. As I said a minute ago, it was after 4:00 o'clock. I couldn't give you the exact hour. I haven't any record of it. The young man on my service saw him soon after he was admitted and called me and I saw him later in the afternoon, but I don't know the exact hour.

Q. What medicine did you administer to Otha Williams on your first call on the 27th of December, 1945?

A. He had already been placed upon some medicine for pain, and the bruised places he had on his head had been painted with an antiseptic, and as far as personally, I didn't order any changes in that, except I think I added an ice-bag to his right jaw, and I also ordered and X-ray of his jaw.

Q. Doctor, what did that X-ray reflect?

A. There was no fracture of the jaw.

Q. Otha Williams was in the hospital for how many days?

A. He was admitted on the 27th of December and discharged on January 11, 1946.

Q. That is 17 days, is that right?

[fol. 183] A. Yes, I guess so.

Q. Doctor, will you tell me if Otha Williams was bleeding on the day he was admittted to the hospital?

A. Not materially, if any at all.

Q. Do you recall him having any bleeding at all?

A. There might have been a few drops of blood on his head, but there was nothing for him to bleed from—lacerations of importance.

Q. Did he lost consciousness that first day?

A. I don't think so. At least, he wasn't unconscious when I saw him. I don't know what condition he was in when he got into the trouble, but when I saw him, he was conscious.

Q. Doctor, will you tell me if at anytime during the 17 days he remained in the Baptist State Hospital—is it true his temperature was taken daily?

A. Yes, every four hours.

Q. Will you look at your record and tell the court whether or not there was ever an instance of Otha Williams having as much as one degree of fever?

A. No, his temperature reached 99 and maybe a fifth on each of the first five days, then on the sixth day it reached 98 and four-fifths, which is just a fifth of a degree, and it ran right at the normal line until January 5th, and on that day he had 99 and one-fifth, and the next two days he had 99 and one-fifth, and it returned to normal and stayed at normal until the 11th when he was discharged.

Q. Doctor, on how many occasions did you see the patient, Otha Williams, from the day he was admitted until the 17th day thereafter when he was discharged?

A. I think I saw him every day that he was in the hospital except January 1st. Some days I saw him twice a day, not because he was in such bad shape, but I had other patients out there and would drop in and see how [fol. 184] he was getting along.

Q. After the first day, did you administer any medicine?

A. Nothing except the nurses continued to give him codine and aspirins for pain. I believe the last dose was given about January 9th.

Q. On January 9th the last dose was given?

A. The last dose of medicine for pain.

Q. Doctor, were there any outward signs of pain that you could determine yourself?

A. The only outward sign I would have would be the pulse rate and maybe muscle spasm. I don't remember anything special about that. His pulse rate never was so bad—it was all the way from about 72 to 92. The first few days it ran above 85 right along up to January 3rd and then it

ran around 80 to 85 until January 9th and after that date it stayed just about 80.

Q. Is that about normal?

A. Pretty normal. We count 72 normal for a man. I think some of the pulse rate increase was due to pain and some due to fright.

Q. During Otha Williams' stay in the hospital, did you attempt to get him out of the hospital before the 11th of January?

A. Not particularly. I mentioned about his going home and he didn't want to go. He wanted to wait until tomorrow and his reason was he was afraid he would get in trouble. We kept him three or four or five days longer than we would have if he hadn't had the fear element mixed in with his condition.

Q. Was there ever a day from the time he was admitted to the hospital until the day he left that he was not in such condition that he could walk?

A. Usually there we keep them pretty quiet and we didn't see any unconsciousness or sign of a brain injury. He had several blows on the head, but not knowing what it was done with, we watch them along. He was pretty quiet [fol. 185] about five days and then he did get up and walk.

Q. Those are your instructions to all patients?

A. Yes. There is one other thing I forgot to mention. He complained of pain in his neck and neck soreness and when a person has neck soreness, we keep them in bed a few days on account of that. I am sure he didn't have a broken neck and for about six days he was confined to bed.

Q. During his 17 day period there, was his temperature near normal?

A. Yes, he never did have over 99 and one-fifth.

Q. But he never had as much as one degree of fever during his entire stay at the hospital?

A. No, he did not.

Q. I believe you testified if he was bleeding when he came in, you didn't know anything about it?

A. Practically nothing at all. The hemorrhaging wasn't of any importance at all. There might have been a few drops.

Q. There was no temperature and he never lost consciousness?

A. No, sir.

Q. And he walked out of the hospital on January 11, 1946?

A. I presume he walked out. He was discharged from the hospital and he was up walking around before he left.

Q. Who paid his bill at the hospital or your fee?

A. You have got me there. I don't pay much attention to my books, but if that is desired, I can call the bookkeeper and find out. George Shepherd is the one that called me on the case, but I don't believe he paid the bill. It may not be paid, I don't know.

Mr. Robley: That is all.

Cross-examination.

By Mr. Robinson:

Q. Doctor, a person can be seriously injured and not necessarily bleed from the scalp?

A. That's right.

[fol. 186] Q. I believe when you said there was no bleeding, you were talking about from the scalp?

A. That's right.

Q. Would you refer to your record, I believe it is on the first page, and see whether or not it says he bled during the day from his nose?

A. Yes, he did bleed some from his nose. I had forgotten about it. He bled from his nose frequently. That was the day after he went in the hospital.

Q. It states that he bled from the nose frequently during that day?

A. That's right. Let me see what the nurses say about that. I had forgotten all about that. It must not have been serious—there is no sign of any packs or anything being placed in his nose and the house doctor just mentioned his nose had bled frequently during the day. It is not mentioned anywhere else. It was anything serious.

Q. It is, at least, not normal?

A. I don't know why this nose bleeding took place. He might have had a blow on it—I don't know whether he did or not.

Q. You said he had some fever while he was in the hospital for a few days after he was admitted.

A. Approximately half a degree.

Q. And he had pain?

A. Yes, he had one blow on the back of his head and it had raised a rather large knot—we call them a mematoma—and he couldn't sleep on his back on account of that knot. I believe we had two sets of X-rays made on that. We were unable to find a clinical sign of any fracture and he complained of his neck being sore, but there was nothing to indicate any fracture.

Q. There wouldn't anything show in an X-ray but broken bones, would it, Doctor?

[fol. 187] A. No, sir.

Q. Torn ligaments or anything of that kind wouldn't show in an X-ray?

A. No, sir.

Q. I believe you said he stayed in the hospital 17 days?

A. From December 27th to January 11th, isn't that 14 days? I believe that is 15 days if you count the day he entered and the day he left.

Q. It would have been all right for him to go home four or five days before he did go, but he was afraid?

A. That is right.

Redirect-examination.

By Mr. Robley:

Q. Would you look at the hospital report and tell me what the hospital record reflects as to the general condition of the patient on the 27th of December, 1945?

A. Well, the notes that were made is that he had several contusions of the scalp with one mematoma in the occipital region—that is the back portion of the head—and the following day was when I discovered he had trouble with his jaw and muscle spasms of some muscles you chew with and some in the neck, and the third day was when the X-rays were made and they were negative, and at the end of seven or ten days, he quit complaining, which proved his neck and jaw injury was not so serious.

Q. Don't you have a record there, the nurses' record, which reveals the condition of the patient each day?

A. Yes, the nurses make mention—the first thing they mentioned was that he was brought to the first floor at 1:00 o'clock, 12-27-45 by Dubisson & Company, a colored ambulance company, and was put to bed and they said I

saw him and he was quiet the rest of the afternoon and that night there wasn't anything unusual—he slept some—and the next morning he was given routine nursing care and [fol. 188] his blood and urine was gotten up to the laboratory and there is nothing in the record anywhere that I see to indicate there was anything seriously wrong.

Q. Does your record reflect whether or not from the 28th day of December until the day of his discharge that he was quiet on each of those days?

A. Yes, he was a very good patient. He never was any trouble. He never did complain when I went in and asked him how he was feeling, he told me about his jaw and neck being sore and about the knot on the back of his head. Those things are not on the record. He never was in any danger and there wasn't any comment other than "quiet".

Mr. Robley: That is all.

Recross-examination.

By Mr. Robinson:

Q. If he had a fractured skull or serious brain injury, in all probability, he wouldn't be able to go back to work in 15 days, would he?

A. No.

Q. It doesn't take such a terribly serious injury to disable a man for a few days, does it, Doctor?

A. No.

Mr. Robinson: That is all.

The Witness excused.

Mr. Schoggen: *The defendants rest.*

The Court: Is there any rebuttal?

Mr. Robinson: That is the State's case, may it please the Court.

RENEWAL OF MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Schoggen: We want to renew our motion for a directed verdict for the defendants.

The Court: The motion is overruled.

[fol. 189] The defendants objected to the above ruling of the Court and at the time asked that their exceptions be noted of record, which was accordingly done.

This was all of the testimony introduced upon the trial of this cause.

(At this time, a recess was taken by the court until 7:45 o'clock P.M. of the same day, and the jury being admonished by the court to keep together and not to discuss the case among themselves or with anyone else. Court was convened at 7:45 P. M. and the following proceedings were had and done:)

STATE'S REQUESTED INSTRUCTIONS

Thereupon, the State requested the Court to instruct the jury as follows:

States Instruction No. 1

You are instructed that Section Two of Act 193 of 1943, which is the law of this state, provides as follows:

"It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years."

The Court: The Court, of its own motion, is giving the following instruction, explanatory of that Act:

[fol. 190] You are instructed that this section of the Act includes two offenses, first, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here. The latter offense is the one on trial in this case.

The Court gave the State's requested Instruction No. 1, as amended by the Court.

The defendants objected to the action of the Court in giving the States Instruction No. 1, as amended, and at

the time asked that their exceptions be noted of record, which was accordingly done.

Mr. Schoggen: The defendants specifically object to the giving of that part of the instruction which includes the part of Section 2 of Act 193 of 1943 which says: "It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violance prevent or attempt to prevent any person from engaging in any lawful vocation," for the reason that this charge is not included in the information and the giving of it tends to confuse the jury. The modification by the Court is further specifically objected to for the reason that it fails to cure the error of giving the part herein quoted.

States Instruction No. 2

If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a "labor dispute" existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further be- [fol. 191] lieve beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously, which acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you wil convict the defendants as charged in the indictment.

The Court gave the State's requested Instruction No. 2.

The defendant objected to the action of the Court in giving the State's requested Instruction No. 2 and at the time asked that their exceptions be noted of record, which was accordingly done.

States Instruction No. 3

You are instructed that the burden of proof rests upon the state to prove to the satisfaction of the jury, beyond a reasonable doubt, every material allegation in the indictment, and, unless that has been done, the jury must find the defendants not guilty.

The Court gave the State's requested Instruction No. 3.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 3 and at the

time asked that their exceptions be noted of record, which was accordingly done.

States Instruction No. 4

The defendants are presumed to be innocent and not guilty as charged in the indictment. This presumption of innocence should continue and prevail in your minds until you are convinced of their guilt by the evidence beyond a reasonable doubt.

The Court have the State's requested Instruction No. 4.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 4 and at the time asked that their exceptions be noted of record, which was accordingly done.

State's Instruction No. 5

[fol. 192] Reasonable doubt is not any possible or imaginary doubt for all things that depend on human testimony are susceptible of some possible or imaginary doubt. To be convinced beyond a reasonable doubt is where after an entire consideration and comparison of all the testimony, the minds of the jurors are left in that condition where they have an abiding faith to a moral certainty of the truth of the charge. A moral certainty is defined as such a certainty as the juror would be willing to act on in an important affair of his own life.

The Court gave the State's requested Instruction No. 5.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 5 and at the time asked that their exceptions be noted of record, which was accordingly done.

Instruction No. 6

(Withdrawn by the State.)

State's Instruction No. 7

You are the sole judges of the credibility of the witnesses and the weight that should be given to their testimony. You may judge a witness' credibility by the manner in which he gives his testimony; his demeanor on the stand, his means of knowledge about the facts to which he testifies; its consistency or inconsistency with the other testimony;

his interest in the result of the trial; any feeling he may have for or against the defendants; any bias or prejudice he may have for or against the defendants; and any other facts that tend to shed light on the truth or falsity of such testimony.

The Court have the State's requested Instruction No. 7.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 7 and at the time asked that their exceptions be noted of record, which was accordingly done.

[fol. 193] State's Instruction No. 8

As man of reason, sense and experience, on the whole testimony in the case, if you are convinced beyond a reasonable doubt of the guilt of any one or all of the defendants, it is you- duty to convict him or them. If, on the other hand, there is a reasonable doubt in your mind of his or their guilt, it is your duty to acquit him or them. You may convict one, two, or all three defendants, or you may acquit one, two or all three of them, according to their guilt or innocence.

The Court gave the State's requested Instruction No. 8.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 8 and at the time asked that their exceptions be noted of record, which was accordingly done.

State's Instruction No. 9

If you find all three of the defendants guilty of a felony as charged in the indictment, your verdict will be, "We, the jury, find the defendants guilty of a felony as charged in the indictment," and assess their punishment at not less than one nor more than two years in the state penitentiary. If you should find one or two of the defendants guilty of a felony as charged in the indictment, your verdict will be, "We, the jury, find (here insert the name or names of the one or ones you find guilty) guilty of a felony as charged in the indictment and assess his or their punishment at not less than one nor more than two years in the state penitentiary." If you should find one, two, or all three of the defendants guilty of a felony as charged in the information and do not agree on the punishment you may leave the

punishment to the court, in which event, the court will fix the punishment within the limits mentioned just the same as you could have done in the first instance. If you find the defendants not guilty or if you have a reasonable doubt [fol. 194] of their guilt, you will say, "We, the jury find the defendants not guilty."

The Court have the State's requested Instruction No. 9.

The defendants objected to the action of the Court in giving the State's requested Instruction No. 9 and at the time asked that their exceptions be noted of record, which was accordingly done.

DEFENDANT'S REQUESTED INSTRUCTIONS

Thereupon, the defendants requested the Court to instruct the jury as follows:

Instruction No. 1

The court charges you that the defendants start out in the beginning of the trial with a presumption of innocence in their favor. This presumption continues throughout the trial until overcome by the evidence and is sufficient of itself to justify a verdict of not guilty, unless you are convinced beyond a reasonable doubt of the guilt of the defendants as charged in the information. If any reasonable view is or can be adopted to justify verdicts of acquittal, or if you have a reasonable doubt of the guilt of the defendants, then it is your duty to adopt such a view and return verdicts of not guilty.

The Court gave the defendants' requested Instruction No. 1.

The State objected to the action of the Court in giving defendants' requested Instruction No. 1 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 2

The Court instructs you that the burden of proof is on the State to prove to you beyond a reasonable doubt, all the material allegations of the information. If on the whole [fol. 195] case the State has failed in this, it will be your duty to return a verdict of not guilty.

The Court gave defendants' requested Instruction No. 2.

The State objected to the action of the Court in giving

defendants' requested Instruction No. 2 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 3

The court instructs you that if you find that any witness has sworn falsely to any material fact in this case, you may disbelieve the whole testimony of such witness, if you believe it to be false; or believe that part which you think to be true and disbelieve that part which you regard to be false.

The Court gave defendants' requested Instruction No. 3.

The State objected to the action of the Court in giving defendants' requested Instruction No. 3 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 4

You are instructed that the mere fact that an information has been returned against the defendants, charging them with a crime, raises no presumption that they are guilty of the offense charged, or of any offense, and will not be considered by you for any purpose while deliberating the question of their guilt or innocence. The information only furnishes a method for presenting an accused person before the court for trial.

The Court gave defendants' requested Instruction No. 4. [fol. 196] The State objected to the action of the Court in giving defendants' requested Instruction No. 4 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 5

The court instructs you that it is the right of the defendants to testify in their own behalf. You will consider the testimony of the defendants as you consider the testimony of other witnesses. In other words, you are not required to believe the testimony of the defendants because they are defendants, nor may you disregard their testimony merely because they are defendants in the case, but you will weigh and consider their testimony by the standards the court has given you in weighing the testimony of other witnesses.

The Court gave defendants' requested Instruction No. 5.

The State objected to the action of the Court in giving defendants' requested Instruction No. 5 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 5-A

The Court instructs you that in weighing the testimony of witnesses, you will take into consideration any bias or prejudice they may have for or against the defendants, any interest they may have in the outcome of the case, their demeanor on the witness stand and any other facts or circumstances in evidence which may shed light on the truth or falsity of the testimony. It is your duty to determine what the truth is, and you will take into the jury room with you, your common sense and good judgment in weighing the testimony of any and all witnesses and in determining what weight you will give to the testimony of each witness.

[fol. 197] The Court gave defendants' requested Instruction No. 5-A.

The State objected to the action of the court in giving defendants' requested Instruction No. 5-A and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 6

The court charges you that you shall not permit any sympathy, prejudice or bias for or against the prosecution of the defendants by reason of the nature of the offense charged or upon any ground or from any source whatever, to influence or affect your consideration of the evidence, or your findings, or your verdict in this case. You will find your verdict according to the evidence given here in the court and under the law as contained in these instruction from the court.

Mr. Schoggen: I want to ask to modify that instruction by cutting out the words "the evidence, or your findings, or"

The Court: I think I am going to cut out the words "or upon any ground or from any source whatever" and cut out the words "your consideration of" and "or". Thereupon the Court amended said instruction to read as follows:

"The court charges you that you shall not permit any sympathy, prejudice or bias for or against the prosecu-

tion of the defendants by reason of the nature of the offense charged to influence or affect your verdict in this case. You will find your verdict according to the evidence given here in the court and under the law as contained in these instructions from the court."

The Court gave defendants' requested Instruction No. 6, as amended by the court.

The defendants objected to the action of the Court in amending their requested Instruction No. 6 and at the time asked that their exceptions be noted of record, which was [fol. 198] accordingly done.

Mr. Schoggen: Defendants object and except to the refusal of the court to give defendants' requested Instruction No. 6 as requested, and to the modification as made by the court and to the giving of the instruction as modified.

Instruction No. 7

(Withdrawn by the defendants)

Instruction No. 8

You are instructed that before the defendants, or either of them can be convicted in this case, you must be convinced beyond a reasonable doubt that they promoted, encouraged, and aided in an unlawful assemblage at the plant of the Southern Cotton Oil Company, for the purpose of preventing Otha Williams from engaging in a lawful vocation.

The Court gave defendants' requested Instruction No. 8.

The State objected to the action of the Court in giving defendants' requested Instruction No. 8 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 9

The court instructs you that mere fact, if you find it to be a fact that the defendants, or either of them, were present at the time of an altercation between Campbell and Williams, such fact alone would not justify you in finding the defendants or either of them guilty.

The Court have defendants' requested Instruction No. 9.

The State objected to the action of the Court in giving defendants' requested Instruction No. 9 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 10

The Court instructs you that it is perfectly lawful for [fol. 199] laborers to peacefully picket their place of employment and to try to persuade by peaceful means other employees to join them.

The Court gave defendants' requested Instruction No. 10.

The State objected to the action of the Court in giving defendants' requested Instruction No. 10 and at the time asked that its exceptions be noted of record, which was accordingly done.

Instruction No. 11

The court instructs you that before you can convict the defendants, or either of them, under the information in this case, you must be convinced beyond a reasonable doubt that the defendants, or either of them, did promote, encourage or aid an unlawful assemblage, as alleged in the information. If the State has failed to convince you beyond a reasonable doubt of this, it will be your duty to return a verdict of not guilty.

The Court refused to give defendants' requested Instruction No. 11.

The defendants objected to the action of the Court in refusing to give their requested Instruction No. 11 and at the time asked that their exceptions be noted of record, which was accordingly done.

These Were All of the Instructions Requested by Either Party or Given by the Court.

* * * * * * *

After the arguments of counsel for the State and the defendants, the jury retired at 9:10 o'clock P. M. to consider their verdict. At 9:40 the court asked the Sheriff to bring the jury in and the following proceedings were had:

The Court: Have you reached a verdict all, gentlemen?

Foreman: Yes, sir.

[fol. 200] The Court: Pass that verdict down the line and let every juror examine it before a verdict is made.

(The jury examines the verdict.)

The Court: I am going to order the jury to retire to the jury room and then return a verdict. Examine what you have and return your verdict.

(The jury again retired at 9:45 P. M. and and 9:55 o'clock P. M. returned back into the courtroom where the following proceedings were had:)

The Court: Gentlemen, the court noticed that the Clerk observed some omission in your verdict and the foreman, at his suggestion, filled it in. Is the verdict now the one you had agreed upon before you came in with it?

Foreman: Yes, sir.

The Court: Is there any challenge to the method by which the verdict was reached or that the Clerk suggested some filling in?

Mr. Schoggen: I don't know of any reason why we should, your honor.

The Court: Read the verdict, Mr. Clerk.

The Clerk (Reading the verdict): "In each case, Roy Cole, Louis Jones and Jessie Bean, we, the jury, find the defendants, Roy Cole, Louis Jones and Jessie Bean, guilty of a felony as charged in the information, and leave the punishment to the court."

Mr. Schoggen: Will you have the jury polled?

(The jury was polled by the Clerk.)

The Court: Very well, gentlemen, there was manifestly some disagreement as to what the punishment should be in this case, so the court is going to let you know now that I will respect the judgment of the two groups and make the sentence one (1) year, and that is what it will be at the proper time.

* * * * * * *

[fol. 201] JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

And now on the 2nd day of January, 1947, and well within the 45 days heretofore by the court granted herein to file their bill of exceptions, come the defendants herein and present to Hon. Gus Fulk, the regular Judge of the Pulaski Circuit Court, First Division, who was present and presiding at all times upon the trial of this cause, this, their bill of exceptions herein which is by said Judge examined, found to be complete and correct record thereof, and same he now approves as such and orders that same be filed as a part of the record in this cause.

Witness my hand as such Judge of the Pulaski Circuit Court, First Division, on this 2nd day of January, 1947.

Gus Fulk, Circuit Judge.

Approved:

—— ——, Prosecuting Attorney; Elmer Schoggen, Attorneys for Defendants.

Reporter's Fee $150.00.

[fol. 202] Reporter's Certificate to foregoing Bill of Exceptions omitted in printing.

[fol. 203] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 204] In Supreme Court of Arkansas

No. 4448

Appeal from Pulaski Circuit Court, First Division

Roy Cole, Louis Jones and Jessie Bean, Appellants.

v.

The State of Arkansas, Appellee.

Judgment—June 9, 1947

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, First Division, and was argued by counsel, on consideration whereof it is the opinion of the court that as to appellants Roy Cole and Louis Jones, there is no error in the proceedings, and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court as to said Roy Cole and Louis Jones, in this cause rendered be, and the same is hereby in all things affirmed with costs, and that unless appellants shall, within fifteen juridical days surrender themselves to the proper authority in execution of said judgment, their bonds be declared as forfeited.

But it is further the opinion of the Court that as to appellant Jessie Bean, there is error in so much of the judgment of said circuit court as found him guilty, since there is no substantial evidence to show that he was actively engaged in the enterprise with the other appellants.

It is therefore considered by the court that as to Jessie Bean the judgment be and it is hereby, for the error aforesaid, reversed, annulled and set aside, and as to said defendant the cause be, and it is hereby dismissed.

[fol. 205] It is further considered that said appellee recover of said appellants Cole and Jones, all *her* costs in this court in this cause expended, and that said Jessie Bean, recover of said appellee all his costs in this court and the court below in this cause expended.

Justices Smith and McHaney dissent as to the reversal as to Bean; Justice Robins dissents on the ground that the judgments as to all the appellants should have been reversed.

[fol. 206] In the Supreme Court of Arkansas

Opinion—June 9, 1947

Griffin Smith, C. J.

The appellants here were appellants in the case decided October 7, 1946. In the former proceeding they were tried on an indictment charging that by the use of force and violence they prevented Otha Williams from engaging in work as a laborer. The charge was based upon a part of Sec. 1 of Act 193 of 1943. *Cole et als v. State*, Ark. Law Rep., V. 85, No. 196 S. W. 2d 582. The judgments were reversed and the causes remanded for a new trial because testimony was erroneously admitted.

On remand the indictment was quashed and the defendants went to trial on information filed by the Prosecuting Attorney. The verdicts were that each should serve a year in the State Penitentiary.

For reversal it is argued (a) that evidence does not support the verdicts; (b) Act 193 cannot be construed to apply to facts presented; (c) Section 2 of Act 193 is unconstitutional and its validity has not been determined; and (d) the defendants' plea of former jeopardy should have been sustained. We discuss the objections in reverse order.

First. (d) This contention cannot be maintained. The defendants were convicted when tried on the indictment—an indictment they alleged was void because of alleged irregularities in the selection of grand jurors. When the causes

were remanded the Prosecuting Attorney elected to proceed by information. In so doing he disregarded the indictment; a result the defendants had sought. The principles announced in *State of Arkansas v. Clark*, 32 Ark. 231, are in point. See also *Johnson v. The State*, 29 Ark. 31. It is cited [fol. 207] in the Clark case. *Fox v. The State*, 50 Ark. 528, 8 S. W. 836, was an appeal from a conviction under an indictment charging false imprisonment. Fox had formerly been indicted for robbery, and acquitted. This Court held that in the circumstances of that case false imprisonment was an ingredient of the robbery charge for which Fox has stood trial and as to which he had been found not guilty; hence there could be but one prosecution. *Lee v. The State*, 26 Ark. 260 is not contrary. That case was decided when the Constitution of 1868 was in effect, its provision being that ". . . no person, after having been once acquitted by a jury, for the same offense shall be again put in jeopardy of life or liberty." The Constitution of 1874 is: ". . . and no person, for the same offense, shall be twice put in jeopardy of life or liberty." Effect of the case is that dismissal of a valid indictment against one who insists upon trial before a jury then sworn amounted to an acquittal, and a plea of former jeopardy was good against a second indictment for the same offense.

Second. (c) We have heretofore construed applicable provisions or sections of Act 193 as cases involving the legislation were presented. In *Smith and Brown v. State*, 207 Ark. 104, 179 S. W. 2d 185, it was said that the Act was not open to constitutional objections. That statement, of course, was intended to apply to the facts of the appeal then being considered. In *Guerin v. State*, 209 Ark. 1082, 193 S. W. 2d 977, the provisions of the Act formerly dealt with were treated as constitutional upon authority of the Smith-Brown case. To the extent that judicial construction of a Legislative Act would deprive an accused person of equal protection of the law, Amendment Fourteen to the Federal Constitution would be violated; but that question is not involved in the dispute with which we are dealing. Our consideration [fol. 208] in this respect is directed to the single proposition that force and violence were employed by two of the defendants.

A literal construction of that part of Sec. 2 of Act 193 making it a felony for any person "acting either by him-

self, or as a member of a group or organization, or acting in concert with one or more persons, to promote, encourage, or aid [in the character of unlawful assemblage there prohibited"] would, it is said, prevent peaceful picketing. The Act does not have this purpose in view, and if it did that part would be struck down by the Courts. *Riggs v. Tucker Duck & Rubber Co.*, 196 Ark. 571, 119 S. W. 2d 507.

Information in the instant case, while charging that Cole, Bean and Jones violated the quoted provision of Sec. 2 of the Act, also accused them of using force and violence to prevent Williams from working. The use of force or violence, or threat of the use of force or violence, is made unlawful by Sec. 1.

Third. (b) In view of the fact that the judgments as to Cole and Jones are affirmed without invoking any part of Sec. 2 of the Act, it is not necessary to discuss the construction appellants think the facts do not sustain.

Fourth. (a) It is admitted that a labor dispute existed and that while the defendants were not "walking picket" they were striking against Southern Cotton Oil Company in Little Rock. Facts incident to the difficulty between Campbell and Williams are set out in the opinion of October 7th 1946. There is substantial testimony in the record before us that Cole was on the scene where a group of strikers had gathered to await exit of Williams and others from the mill, five of the employes having remained at work. Cole carried a club, or walking stick. He told Willie Brown to go ahead, that "they" were not after him—but, in- [fol. 209] ferentially, were waiting for Williams. Jones said, "Come on, boys," and the strikers "flew up like blackbirds and came fighting." No witness testified to any activity by Bean. Willie Johnson merely saw him standing across the street. Brown "never did see Bean." Elvie Washington merely "saw" Bean, but did not say what he was doing. Bishop Jackson said "Bean had been there on the corner, but had gone and was about half a block away."

These were the material witnesses who testified for the State. References to time and place were directed to the assault upon Williams by Campbell. Williams in defense used a pocket knife, inflicting wounds from which Campbell died.

While it is probable that Bean was associated with Cole and Jones in their undertaking, Act 193 is highly penal,

and we feel that evidence to sustain a conviction should not rest upon any but a substantial basis.

The judgments as to Cole and Jones are affirmed; as to Bean the judgment is reversed with directions that the cause be dismissed.

Mr. Justice Frank G. Smith and Mr. Justice McHaney think the evidence was sufficient to affirm as to all of the defendants, and therefore dissent as to the reversal of the judgment against Bean; Mr. Justice Robins on the ground that the evidence was insufficient as to all three of the defendants.

[fol. 210] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed June 25, 1947

Come the appellants, Roy Cole and Louis Jones, and respectfully petition the court that they be granted a rehearing in this cause:

1. For cause of this petition, they state that the court in the first paragraph of the opinion, stated that the defendants sought to be proceeded against by information instead of indictment. It is respectfully submitted to the court, that this conclusion is not borne out by the record.

2. In the second paragraph, the opinion states that the equal protection of the law guaranteed by the 14th Amendment to the Federal Constitution, is not involved. It is further stated, "our consideration in this respect is directed to the single proposition that force and violence were employed by two of the defendants." As we understand the information under which appellants were tried, it did not involve the charge of force and violence at all, but was made under Sec. 2 of Act 193, which does not cover force and violence.

3. The opinion affir-s the conviction of Cole and Jones "without invoking any part of Sec. 2 of Act 193", although the information was based entirely on Sec. 2 of the Act.

4. To uphold the conviction of these defendants under one section of a statute when they were charged with violation of another section deprives the defendants of a fair trial and is a denial of due process of law.

5. Under the instructions given by the court to the jury, the jury could have found the defendants guilty only of [fol. 211] activities relating to an alleged unlawful assemblage. The jury could not have found the defendants guilty of using force and violence because the jury was given no instructions on any such finding. To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the 14th Amendment to the United States Constitution.

Wherefore, these petitioners pray that they be granted a rehearing, and on such rehearing, the judgments of conviction against them be reversed and dismissed.

Respectfully submitted, Ross Robley and Elmer Schoggen, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 212] IN SUPREME COURT OF ARKANSAS

ORDER DENYING PETITION FOR REHEARING—June 30, 1947

Rehearing petitions denied:

* * * * * * *

No. 4448—Roy Cole, Louis Jones, et al v. State.

[fols. 213-215] Cost Bond on Appeal for $500 filed July 11, 1947, omitted in printing.

[fol. 216] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 217] ARKANSAS SUPREME COURT

No. 4448

ROY COLE and LOUIS JONES

v.

STATE OF ARKANSAS

STIPULATION ON PRINTING OF RECORD

It is stipulated and agreed by and between counsel for the parties hereto that there may be omitted from the

printed record to be presented to the United States Supreme Court on appeal or on petition for certiorari in the above case, the proceedings on *voir dire* in the trial of his case in the Pulaski Circuit Court, First Division, such proceedings commencing on page 32 of the certified transcript of the record, commencing with the words: "The Clerk: Mr. Gerald LeFever presented," and ending on page 87 of said transcript with the words: "Mr. Schoggen: He is good." There may also be omitted from the printed record pages 4 and 5 of the transcript (bail bonds, 28, 29 and 30 (bonds on appeal), and 214 and 215 (power of attorney from National Surety Corporation to T. E. Welsh and others).

For the State of Arkansas: Guy E. Williams, Attorney General, Oscar E. Ellis, Assistant Attorney General, for Roy Cole and Louis Jones: Lee Pressman.

[fol. 218] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 8, 1947

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 373

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

LEE PRESSMAN,
General Counsel, Congress of Industrial Organizations,

DAVID REIN,
General Counsel, Food, Tobacco, Agricultural and Allied Workers of America (CIO),

JOSEPH FORER,
Greenberg, Forer & Rein,
Counsel for Petitioners.

INDEX

Table of Cases Cited

Constitution and Statutes Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. ————

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Roy Cole and Louis Jones pray that a writ of certiorari issue to review a decision of the Supreme Court of Arkansas rendered June 9, 1947, petition for rehearing denied on June 30, 1947, which decision affirmed judgments of the Pulaski Circuit Court, First Division, finding petitioners guilty of violating Act 193, Arkansas Acts of 1943 (Pope's Digest Stats. Ark., 1944 Cum. Supp. p. 691).

Opinion Below

The opinion of the Supreme Court of Arkansas has not yet been officially reported. It appears in the Record at 206–209.

Summary Statement of Matter Involved

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas Grand Jury for using "force and violence" to "prevent Otha Williams from engaging in work as a laborer of the Southern Cotton Oil Company" (R. 18). The indictment thus alleged a violation of Section 1 of Act 193 of the 1943 Arkansas Acts (quoted in the Appendix to this petition). The three defendants were convicted, but

on appeal the Supreme Court of Arkansas reversed and remanded for a new trial. *Cole et al. v. State*, 196 S.W. (2d) 582.

Following the reversal, the Prosecuting Attorney filed the felony information involved in this proceeding. This information charged as follows:

"On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas." (R. 2.)

The information thus charged Cole, Jones and Bean with violating one of the clauses of section 2 of the Act (see Appendix), that concerning aiding an unlawful assemblage. It did not repeat the charge of the indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, not a defendant.

The Pulaski Circuit Court (First Division) then on its own motion quashed the indictment which had been the basis for the first trial (R. 8).

All three defendants were convicted on trial of the information (R. 200, 15), and they were each sentenced to serve a year in the State Penitentiary (R. 25, 26, 27).

On appeal, the Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of Cole and Jones, the petitioners. The conviction of Bean was reversed with directions that the case be dismissed as to him (two Justices dissenting), on the ground that the evidence was not sufficient to sustain his conviction. (R. 204–209.)

In its opinion the Supreme Court of Arkansas asserted, manifestly erroneously, that the information accused the petitioners of using force and violence to prevent Otha Wil-

liams from working, in violation of section 1 of the Act (R. 208). It thus avoided the constitutional objections raised to the application of the statutory provision for violation of which the petitioners had actually been informed against (R. 208).

A petition for rehearing (R. 210, 211) was summarily denied by the Court on June 30, 1947 (R. 212).

At the trial, the following facts appeared:

The petitioners are two Negroes,[1] who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's workers, including the petitioners, went out on strike for higher wages and shorter hours; five workers remained in the plant (R. 88, 90, 159, 179). On December 26, 1945, the five non-striking workers left the plant in a group at the close of work. Near the plant and across a railroad track was a group of about four of the strikers. The testimony differs as to their identity and number, but some of the State's testimony placed Cole and Jones in the group. One of the strikers, identified by the State's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait. Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams used a pocket knife and killed Campbell (R. 94–97, 100, 105, 106, 112–115, 123–126, 167). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 117, 126, 140), nor does the record show any violence or physical conflict other than that between Williams and Campbell.[2]

---

[1] The record designates negro witnesses by the symbol "(CM)". See R. 159 (Jones), 168 (Cole). The same symbol is used in the information (R. 2).

[2] Willie Brown, one of the five workers, testified that after Williams refused to stop, Louis Jones gave a signal and said, "Come on, boys," after which "they flew up like blackbirds and came fighting" (R. 96). However, no testimony is in the record of any blow struck other than in the Campbell-Williams fight, and Brown left the scene unmolested and on Cole's suggestion, after seeing Campbell strike Williams (R. 96, 97, 170, 171). Willie Johnson and Elvie Washington, two of the five workers, ran away (R. 108, 109, 110, 115); and the movements of the fifth worker (Lawrence Cross), who did not testify, are not in the record.

At the trial the Court instructed the jury:

"If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a 'labor dispute' existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants, wilfully, unlawfully and feloniously, while acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment." (R. 190, 191.)

The Court also instructed the jury that "it is perfectly lawful for laborers to peacefully picket their place of employment and to try to persuade by peaceful means other employees to join them" (R. 198, 199), and that the mere fact that defendants were present at the time of the Campbell-Williams altercation would not justify a verdict of guilty (R. 198). However, the Court did not instruct the jury that guilt could be found only if the defendants participated in or encouraged or aided any violent actions.

Statement as to Jurisdiction

This Court has jurisdiction under the provisions of Section 237(b) of the Judicial Code, as amended, 28 U.S.C. 344(b). In the proceedings below there was drawn in question the validity of Act 193, Arkansas Acts of 1943, on the ground of its being repugnant to the Constitution of the United States, and it was also claimed that the conviction thereunder infringed rights and privileges guaranteed to the petitioners under the Fourteenth Amendment.

The case was finally disposed of by the courts of Arkansas when the Supreme Court of Arkansas denied the petition for rehearing on June 30, 1947 (R. 212).

The federal questions were raised in the State courts as follows: By demurrer to the information (R. 10), the objection was made that the vagueness and uncertainty of the charges violated the United States Constitution. The demurrer

was overruled by the trial court (R. 9). The same objection was raised by the motion for a new trial (R. 20), which was overruled (R. 24). By motion to quash the information (R. 14), the objection was made that the Act violated the United States Constitution in making felonious conduct which under other circumstances was a misdemeanor. This motion was overruled by the trial court (R. 13). The same objection was raised by the motion for a new trial (R. 20), which was overruled (R. 24). On appeal to the Supreme Court of Arkansas, the appellants' briefs argued that the Act violated the Fourteenth Amendment because it infringed freedom of assembly and speech, was too vague, and constituted class legislation. The Supreme Court of Arkansas in its opinion (R. 206–209) referred, somewhat obscurely, to the Constitutional objections made, but affirmed the convictions without disposing of these issues on the palpably erroneous assumption that the defendants had also been informed against under section 1 of the statute. The petition for rehearing (R. 210, 211) pointed out this error, and also raised the objection that affirmance of the conviction under a statutory provision not included in the information itself violated the Fourteenth Amendment. The petition for rehearing was denied by the Supreme Court of Arkansas (R. 212).

Statute Involved

Act 193 of the Arkansas Acts of 1943 appears in the Appendix to this petition.

Questions Presented.

1. Were the petitioners denied freedom of speech and of assembly in violation of the Fourteenth Amendment by the clause of section 2, Act 193, Arkansas Acts of 1943, under which they were convicted, or by their convictions thereunder?

2. Were the petitioners denied due process of law in violation of the Fourteenth Amendment by conviction under a statute or on charges too vague or indefinite to inform them of the nature of the crime?

3. Were the petitioners denied due process of law or the equal protection of the laws in violation of the Fourteenth

Amendment by the circumstance that their convictions were affirmed under a criminal statute for violation of which they had not been charged?

4. Does Act 193 violate the equal protection of laws provision of the Fourteenth Amendment by making certain acts, which otherwise are misdemeanors, felonious when committed by striking workmen?

Reasons for Granting the Writ

The writ should be granted because: (1) the issues involved have not heretofore been determined by this Court; (2) they are of great public importance; (3) the decisions below contravene principles established by decisions of this Court.

1.(a) This Court has never passed on the validity, either on its face or as applied, of the statutory provision under which the petitioners were informed against and convicted at trial. This provision, as literally read and as applied at trial, makes felonious the mere acts of promoting, encouraging or aiding an assemblage at or near any place where a labor dispute exists, being qualified, if at all, only by the condition subsequent that some member of the assemblage engage in violence. The provision is not, therefore, similar to those enactments which have prohibited the use of force or violence to prevent people from working, some of which have been before this Court. *E.g., Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437.

(b) Although it is elementary that due process prohibits conviction on charges not made, we are not aware of any decision of this Court which squarely considered whether this principle was infringed because the State appellate court affirmed a conviction on the basis of charges not made.

2.(a) In practical effect, the statutory provision under which petitioners were convicted and its application in this case constitute a device to evade, through obscurity of language and application, the inhibitions on State action devel-

oped in *De Jonge v. Oregon*, 299 U. S. 353; *Carlson v. California*, 310 U. S. 106; *Thornhill v. Alabama*, 310 U. S. 88; and *AFL v. Swing*, 312 U. S. 312. Any encroachment upon the principles of these cases is *per se* of great concern to organized labor and to the public generally.

This statutory provision and its application in this case have hindered efforts of the Food, Tobacco, Agricultural and Allied Workers of America (CIO), of the Congress of Industrial Organizations, and of labor generally, to organize employees in Arkansas, including low-paid employees of plants processing agricultural products. The assembling of striking workers is handicapped by their warranted fear that their mere assembling, no matter how peaceful their intentions and conduct, may subject any one of them to a felony conviction. The same situation exists in Texas, whose statute was copied by Arkansas. Act 1621b, Texas Penal Code, as amended by c. 100, Acts 1941; Vernon's Ann. Penal Code, art. 1621b. It is possible that other states will imitate these statutes in view of their effectiveness in hampering organized labor.

3.(a) Literally read, the statutory provision under which petitioners were tried makes it a felony for any person to "promote, encourage or aid" any assemblage at or near any place where a labor dispute exists. So read, it clearly violates rights of free assembly and free speech. *De Jonge v. Oregon, Carlson v. California, Thornhill v. Alabama, AFL v. Swing, supra.* If the statute is construed, as it possibly can be with a small sacrifice of literalness, as making the encouragement of such assemblage felonious only if some member of the assembly (who need not be the person tried) engages in violence or threats to prevent persons from working, it still violates these rights as established by the cited cases. In such a case, furthermore, it violates due process by departing from the principle that guilt is personal and is not to be imputed to one person for another's misconduct. *Kotteakos v. U. S.*, 328 U. S. 750, 773; *De Jonge v. Oregon, supra; Bridges v. Wixon*, 326 U. S. 135; *Schneiderman v. U. S.*, 320 U. S. 118, 136.

Nor is the statute saved by a construction of the State courts (*cf. Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, supra*). The jury was not instructed as to any construction of the act, and it could have found guilt consistent with the instructions merely by finding that the defendants had assembled in concert with others, without participating in or encouraging violence. Indeed, it convicted Bean in the same trial, and as to him the Arkansas Supreme Court itself recognized (R. 209) that the most the evidence showed was that he had been seen near the scene of the altercation. We submit that a statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury.

(b) The statute and the information are unconstitutionally vague (*cf. Connally v. General Construction Co.*, 269 U. S. 385; *Lanzetta v. New Jersey*, 306 U. S. 451; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614), particularly since freedom of expression is involved. *Cf. Herndon v. Lowry*, 301 U. S. 242.

The statute's conception of a physical "place" where a labor dispute (defined as an employer-employee controversy on representation or terms of employment) exists is a solecism whose lack of meaning alone is fatal to its validity. For some purposes, as this Court has noted, an impasse reached between workers and employers, both located in San Francisco or Seattle, may create a labor dispute which technically exists "at" canneries in Alaska. *Unemployment Compensation Commission v. Aragon*, 329 U. S. 143. In addition, the test of "nearness" without further particularization is too vague to satisfy due process under the express language of *Connally v. General Construction Co., supra*, at 294, 395.

And if construction could save the statute from unconstitutionally infringing rights of assembly and speech, the statute would then be invalid on the grounds that it could not be fairly understood "in advance of judicial utterance." *Lanzetta v. New Jersey, supra*, at 456. See also *Connally v. General Construction Co., supra*, at 394; *Pierce v. U. S.* 314 U. S. 306.

(c) "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon, supra*, at 362.

See also *Albrecht v. U. S.*, 273 U. S. 1, 8; *Snyder v. Massachusetts*, 291 U. S. 97, 105; *Powell v. Alabama*, 287 U. S. 35, 68, 69; *Twining v. New Jersey*, 211 U. S. 78, 111.

And "it is perfectly obvious that where . . . an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment." *Frank v. Mangum*, 237 U. S. 308, 327. The Supreme Court of Arkansas construed the indictment as charging the use by the petitioners of "force and violence to prevent Williams from working" (R. 208), and this Court must therefore review the conviction as having been rendered for that crime. *De Jonge v. Oregon, supra. Cf. Herndon v. Lowry, supra.* Since it is evident that the indictment gave no fair notice that such a crime was charged, but on the contrary charged an entirely different offense, it is clear that petitioners were convicted of a charge not made, and hence were denied due process.

By misconstruing the indictment, the Arkansas Supreme Court in effect denied an appellate review of the sufficiency of the evidence to support the verdict. Since it gives such a review to others convicted under Act 193 (*e.g., Smith et al. v. State*, 207 Ark. 104, 179 S.W. (2d) 195), it denied the petitioners the equal protection of the laws. *Cf. Cochran v. Kansas*, 316 U. S. 255; *Hysler v. Florida*, 215 U. S. 420, 422, 423.

(d) Taking the Arkansas court's construction of the indictment as alleging a violation of section 1 of the Act, it will be observed that if a striking worker assaults a non-striker, he is guilty of a felony. If simultaneously, within a foot of this assault, a non-striker assaults a striker, he is guilty of a misdemeanor. We submit that this is discriminatory class legislation, and that the statute therefore violates the Fourteenth Amendment.

Conclusion

The writ of certiorari should be granted and the decision of the lower court should be reversed.

Respectfully submitted,

LEE PRESSMAN,
General Counsel, Congress of Industrial Organizations,
718 Jackson Place, N. W.
Washington, D. C.

DAVID REIN,
General Counsel, Food, Tobacco, Agricultural and Allied Workers of America (CIO),

JOSEPH FORER,
Greenberg, Forer & Rein,
1105 K Street, N. W.
Washington, D. C.

Counsel for Petitioners.

APPENDIX

Act 193, Acts of Arkansas 1943

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 373

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS

LEE PRESSMAN,
General Counsel, Congress of Industrial Organizations,

DAVID REIN,
General Counsel, Food, Tobacco, Agricultural and Allied Workers of America (CIO),

JOSEPH FORER,
GREENBERG, FORER & REIN,
Counsel for Petitioners.

INDEX

CASES CITED

STATUTES AND CONSTITUTION CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 373

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS

OPINIONS BELOW

No opinion was filed by the Pulaski Circuit Court (First Division), the trial court. The opinion of the Supreme Court of Arkansas has not yet been officially reported, but appears in 202 S.W. (2d) 770, and in the Record at 105–108.

JURISDICTION

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended, 28 U.S.C. 344(b). The petition for a writ of certiorari was granted on December 8, 1947.

STATUTE INVOLVED

Act 193 of the Arkansas Acts of 1943 appears in the Appendix to this brief.

STATEMENT OF THE CASE

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas grand jury for using "force and violence" to "prevent Otha Williams from engaging in work as a laborer of the Southern Cotton Oil Company" (R. 6). The indictment thus alleged a violation of Section 1 of Act 193 of the 1943 Arkansas Acts (quoted in the Appendix of this brief). The three defendants were convicted, but on appeal the Supreme Court of Arkansas reversed and remanded for a new trial. *Cole et al. v. State,* 196 S.W. (2d) 582.

Following the reversal, the prosecuting attorney filed the felony information involved in this proceeding. This information charged as follows:

> On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas. (R. 1.)

The information thus charged Cole, Jones and Bean with violating one of the clauses of section 2 of the Act (see Appendix), that concerning aiding an unlawful assemblage. It did not repeat the charge of the indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, not a defendant.

The Pulaski Circuit Court (First Division) then on its own motion quashed the indictment which had been the basis for the first trial (R. 2).

All three defendants were convicted on trial of the information (R. 5, 103), and they were each sentenced to serve a year in the State Penitentiary (R. 10, 11, 12).

On appeal, the Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of Cole and Jones, the

petitioners. The conviction of Bean was reversed with directions that the case be dismissed as to him (two Justices dissenting), on the ground that the evidence was not sufficient to sustain his conviction (R. 104–108).

In its opinion the Supreme Court of Arkansas asserted, manifestly erroneously, that the information accused the petitioners of using force and violence to prevent Otha Williams from working, in violation of section 1 of the Act (R. 107). It thus avoided the constitutional objections raised to the application of the statutory provision for violation of which the petitioners had actually been informed against (R. 107).

A petition for rehearing (R. 108, 109) was summarily denied by the court on June 30, 1947 (R. 109).

At the trial, the following facts appeared:

The petitioners are two Negroes,[1] who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's workers, including the petitioners, went out on strike for higher wages and shorter hours; five workers remained in the plant (R. 14–16, 70, 71, 85). On December 26, 1945, the five non-striking workers left the plant in a group at the close of work. Near the plant and across the railroad track was a group of about four of the strikers. The testimony differs as to their identity and number, but some of the State's testimony placed Cole and Jones in the group. One of the strikers, identified by the State's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait. Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams used a pocket knife and killed Campbell (R. 19-22, 24, 25, 28, 29, 34–36, 42–45, 76). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 37, 38, 45, 54, 55), nor does the record show any violence

[1] The record designates Negro witnesses by the symbol "(CM)". See *e. g.*, R. 70 (Jones), 77 (Cole). The same symbol is used in the information (R. 1).

or physical conflict other than that between Williams and Campbell.[2]

At the trial the court instructed the jury:

> If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a "labor dispute" existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously, while acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment. (R. 95.)

The court also instructed the jury that "it is perfectly lawful for laborers to peacefully picket their place of employment and to try to persuade by peaceful means other employees to join them" (R. 102), and that the mere fact that defendants were present at the time of the Campbell-Williams altercation would not justify a verdict of guilty (R. 101). However, the court did not instruct the jury that guilt could be found only if the defendants participated in or encouraged or aided any violence, whether committed by Campbell or anyone else.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in affirming the convictions of the petitioners since the clause of section 2, Act 193, Arkansas Acts of 1943, under which petitioners were convicted, and their convictions thereunder, violate the Fourteenth Amendment by depriving petitioners of freedom of speech and assembly and by imputing to them the guilt of another.

2. The court below erred in affirming the convictions since

---

[2] Willie Brown, one of the five workers, testified that after Williams refused to stop, Louis Jones gave a signal and said, "Come on, boys," after which "they flew up like blackbirds and came fighting" (R. 21). However, no testimony is in the record of any blow struck other than in the Campbell-Williams fight, and Brown left the scene unmolested and on Cole's suggestion, after seeing Campbell strike Williams (R. 21, 22, 79). Willie Johnson and Elvie Washington, two of the five workers, ran away (R. 31, 32, 36); and the movements of the fifth worker (Lawrence Cross), who did not testify, are not in the record.

the statute is so vague and indefinite as not to supply an ascertainable standard of guilt, and thus denies the petitioners due process of law, in violation of the Fourteenth Amendment.

3. The court below erred in affirming the convictions under a statute for violation of which the petitioners had not been charged; the court below thus denied petitioners due process of law and the equal protection of the laws in violation of the Fourteenth Amendment.

4. The court below erred in affirming the convictions since Act 193 violates the due process and equal protection of laws provisions of the Fourteenth Amendment by making certain acts, which otherwise are misdemeanors, felonious merely because they are committed in aid of striking workmen.

ARGUMENT

I. The statute and the convictions thereunder violate the Fourteenth Amendment by prohibiting free speech and assembly and by imputing guilt for another's acts.

Section 2 of Act 193, Arkansas Acts of 1943, defines two crimes. First, it is a felony for a person, acting in concert with others, to assemble near a place where a labor dispute exists and to use force or violence to prevent any person from engaging in a lawful vocation. Second, it is a felony for any person to promote, encourage or aid "any such unlawful assemblage." The petitioners were informed against and convicted on trial only of the second of these two offenses. (See information, R. 1.)

The second offense presupposes that the first characterizes a certain type of assemblage as "unlawful." This is not, of course, the case; the first part of the statute makes unlawful not any assembling *per se* but rather assembling followed by the act of using force and violence to prevent a person from working.

There are, therefore, at least tw possible meanings which can be ascribed to the second offense within the statutory context. (1) Under the most literal reading of the statute, the second offense consists simply of promoting, encouraging or aiding an assemblage at or near a place where a labor dispute

exists. (2) With a small sacrifice of literalness, the second offense may be taken to consist of encouraging or aiding such an assemblage if thereafter any member of the assembly (who, as here, need not be the person charged with the offense) uses force or violence to prevent someone from working.

Whichever of these two meanings is assigned, the statute clearly violates the Fourteenth Amendment. That Amendment protects freedom of speech and of assembly from infringement by the States. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697; *Stromberg v. California*, 283 U. S. 359; *DeJonge v. Oregon*, 299 U. S. 353; *Thomas v. Collins*, 323 U. S. 516; *Hague v. C. I. O.*, 307 U. S. 496. Striking laborers have a constitutional right to assemble peaceably near the plant which is struck and to express their views on the matter in controversy. Legislation which denies them that right is invalid. *Carlson v. California*, 310 U. S. 106; *Thornhill v. Alabama*, 310 U. S. 88; *AFL v. Swing*, 312 U. S. 312.

The statutory clause here involved, if assigned the first of the two suggested meanings, prohibits the simple act of encouraging an assembly in the neighborhood of a struck plant. The interdicted act is itself an exercise of speech and of assembling. The rights to speak and to assemble would be illusory if there did not also exist the rights to arrange to speak and to assemble. The First and Fourteenth Amendments cannot be taken to protect merely spontaneous speech or accidental assembly. It is obvious that the picketing assemblies held, in the cases cited above, to be beyond the state's prohibitory powers, were prearranged.

By the same token, the statute is invalid if it be given the second of the two meanings mentioned above—namely, that encouraging the assembly becomes felonious on the occurrence of the condition subsequent that any member of the assembly resorts to violence. If the State may not directly prohibit the encouragement of the assembly, it clearly may not prohibit it, indirectly but no less effectively, by attaching to it highly penal consequences upon the occurrence of action neither participated in nor encouraged by the persons who encouraged the assembly, beyond their control, and not necessarily an outgrowth of the assembly. The liberties guaranteed by the

First and Fourteenth Amendments cannot, we submit, be denied by such indirection or circumvention. *Cf. Bailey v. Alabama*, 219 U. S. 219; *Grosjean v. American Press Co.*, 297 U. S. 233; *Murdock v. Pennsylvania*, 319 U. S. 105.

Furthermore, the imputing of criminal liability to one person for the independent acts of another is itself a deprivation of due process. "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos v. United States*, 328 U. S. 750, 772. *Cf. Bridges v. Wixon*, 326 U. S. 135; *DeJonge v. Oregon, supra; Schneiderman v. U. S.*, 320 U. S. 118, 136.

Nor is there any possibility of saving the statute, at least as here applied, by a construction limiting the felony to the encouragement or persuasion of an assembly formed for the purpose of engaging in violence. *Cf. Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U. S. 437. No such construction was given to the jury. The jury therefore, could have found guilt consistent with the instructions merely by finding that the defendants had encouraged the assembly, even though they had not participated in, encouraged, contemplated, or anticipated the occurrence of violence. Indeed, it convicted Bean in the same trial, and as to him the Arkansas Supreme Court itself recognized (R. 107) that the most the evidence showed was that he had been seen near the scene of the altercation. It is apparent that a statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury. *Bailey v. Alabama, supra. Cf. Screws v. U. S.*, 325 U. S. 91.

On the contrary, the statute must be regarded as having been literally applied or, more likely, as having been applied with the construction most malign to the defense which is reasonably derivable from its text. This is particularly true because a saving construction of the statute would necessarily be a torturing of the text. Since section 1 of the statute amply covers the use or attempted use of force or threats, section 2 must be taken as being aimed at the act of assembling under either of the two possible constructions.

It is true that the trial court charged that peaceful picketing was lawful. In the statutory context, this charge was hardly sufficient to remove picketing from the statute's application since it did not negate guilt arising as a result of violence committed on the picket line by some other person. But even if the charge be construed to eliminate picketing from the statute's ambit, it still did not remove other assemblies which enjoy the same constitutional immunity. Since the court did not instruct the jury that guilt could be found only if the defendants had encouraged or participated in violence, it is apparent that the statute could have been applied, consistent with the instructions, to punish an assembly which, though peaceful, lawful, and constitutionally protected, was not engaged in picketing. The prosecution's case, in fact, showed that the assemblage here involved was not picketing, as that activity is commonly understood.

II. The statute is in conflict with the Fourteenth Amendment because of its vagueness.

The due process clause invalidates a criminal statute which is so obscure that persons subject thereto may not reasonably understand the actions proscribed. *Lanzetta v. New Jersey*, 306 U. S. 451; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614; *Connelly v. General Construction Co.*, 269 U. S. 385. This rule is especially exacting where the statute impinges on the liberties of expression protected by the First Amendment and the Fourteenth Amendment. *Cf. Herndon v. Lowry*, 301 U. S. 242.

The statute under consideration is clearly invalid under these tests. We have already seen the confusion arising from the reference to "such unlawful assemblage" when no assemblage is in fact so characterized. The ambiguity so arising in itself prevents the statute from establishing a reasonably ascertainable standard of guilt, particularly since freedom of speech and assembly are so intimately concerned.

As indicated above, the statute was not so construed at trial as to prevent an unconstitutional infringement of the rights of assembly and speech. But even if it had been given such a construction, the interpretation would have necessarily

been a highly strained version of the text; hence the statute would then have been invalid on the grounds that it could not be fairly understood "in advance of judicial utterance." *Lanzetta v. New Jersey, supra,* at 456. See also *Connally v. General Construction Co., supra,* at 394; *Pierce v. U. S.,* 314 U. S. 306.

The statute possesses still other fatal elements of vagueness. It refers to an assemblage "at or near any place where a labor dispute exists." Section 3 defines "labor dispute" as including "any controversy between an employer and two or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment."

A "labor dispute" is, therefore, an intangible clash of interests, and the statute's conception that it has a tangible existence at a physical "place" is a solecism without a clearly ascertainable meaning. For some purposes, as this Court has noted, an impasse reached between workers and employers, both located in San Francisco or Seattle, may create a labor dispute which exists "at" canneries in Alaska. *Unemployment Compensation Commission v. Aragon,* 329 U. S. 143.

Finally, the test of "nearness" without further particularization is too vague to satisfy due process. The concept of "nearness" is elastic; it is both subjective and relative, varying with the circumstances involved and the mode of passage contemplated. The same person who in one connection states that Bethesda, Maryland, is "far" from the Capitol may, in the next moment and wholly consistently, state in another connection that Germany is "near" England. In the first instance, he means that commuting daily by bus between Bethesda and work in Washington takes a relatively large part of the working day. In the second instance he means that one country's bombers may reach the other country's shores. What seems "far" by foot seems not so "far" by automobile, and positively "near" by plane. The statute here involved furnishes no standards or guides to the meaning of "near" as therein used, nor can any standard be reasonably derived by an analysis of its text or purpose. As appears

from the illustrations given, "nearness" is a description whose aptness relates to a method of transportation and the purpose for which the transportation is used. The statute contemplates neither such a method nor such a purpose, and accordingly not even an approximate standard or rationalization of the term is available. Is every point in North Little Rock "near" the place (whatever that is) of the dispute between the Southern Cotton Oil Company and its employees? What about points in Little Rock? Or in Hot Springs? What about points in Chicago, if the Company's products normally move to that area?

Connally v. General Construction Co., 269 U. S. 385, is, we submit, controlling for the proposition that the test of "nearness" is here fatally vague. In that case the Court held invalid an Oklahoma statute prescribing as minimum wages the "current rate" in the "locality where the work is performed." The Court held, among other things, that the "locality" test was invalid for indefiniteness. It is apparent that this concept as used in the minimum-wage statute was much more susceptible to meaning than is "nearness" in the Arkansas statute here involved. Nevertheless, the Court stated (at 394, 395):

> In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state supreme court on rehearing in *State v. Tibbetts*,—Okla. Crim. Rep.—, 205 Pac. 776, 779. But all the court did there was to define the word "locality" as meaning "place," "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by

areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, 296, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Woods v. Cochrane*, 38 Iowa 484, 485; *State ex rel. Christie v. Meek*, 26 Wash. 405, 407, 408, 67 Pac. 76; *Millville Improv. Co. v. Pitman, G. & C. Gas Co.*, 75 N. J. L. 410, 412, 67 Atl. 1005; *Thomas v. Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries, for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

III. The Supreme Court of Arkansas violated the Fourteenth Amendment by affirming under a statute for violation of which the petitioners had not been charged.

A comparison of Act 193 with the information (R. 1) under which the petitioners were convicted at trial demonstrates beyond dispute that the petitioners were charged and tried by the jury only for an offense created by section 2 of the Act—encouraging an unlawful assembly. The information makes no allegations which can conceivably charge a violation of section 1 of the Act. The gravamen of section 1 is the direct use, or attempted use, of violence or threats to prevent any person from engaging in any lawful vocation. The section contains no reference to any assemblage. The informa-

tion, on the other hand, refers to the petitioners only by alleging that they promoted, encouraged and aided an unlawful assemblage. The use of force and violence to prevent Otha Williams from working is alleged to have been committed by Walter Ted Campbell. There is no allegation that petitioners used force and violence against Otha Williams or anyone else. There is not even an allegation that the petitioners acted in concert with Campbell in promoting the assemblage or in any other way. The information alleges rather that Cole, Jones and Bean acted in concert *"with each other."*

Nevertheless, the Supreme Court of Arkansas affirmed the convictions on the egregiously mistaken belief that Cole and Jones were accused of violating section 1 of the Act by using force and violence against Williams. That court stated (R. 107, emphasis added):

> Information in the instant case, while charging that Cole, Bean and Jones violated the quoted provision of Sec. 2 of the Act, *also accused them of using force and violence to prevent Williams from working.* The use of force or violence, or threat of the use of force or violence, is made unlawful by Sec. 1.
>
> . . . In view of the fact that *the judgments as to Cole and Jones are affirmed without invoking any part of Sec. 2 of the Act,* it is not necessary to discuss the construction appellants think the facts do not sustain.

It is beyond dispute, therefore, that the Supreme Court of Arkansas committed error and that it persisted in that error even after its attention was specifically directed thereto by the petition for rehearing (R. 108, 109). The only question which remains is whether the error is of a kind which gives this Court jurisdiction to reverse.

The error is plainly of such a character, since it results in denying the petitioners due process and the equal protection of laws, guaranteed by the Fourteenth Amendment.

"Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon, supra,* at 362. See also *Albrecht v. U. S.,* 273 U. S. 1, 8; *Snyder v. Massachusetts,* 291 U. S. 97, 105; *Powell v. Alabama,* 287 U. S. 35, 68, 69; *Twining v. New Jersey,* 211 U. S. 78, 111. And the appeal

proceeding is, for constitutional purposes, as much a part of the conviction as the trial judge's charge or the trial judgment. As stated in *Frank v. Mangum*, 237 U. S. 309, 327:

> . . . it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the state of Georgia . . . provide for an appeal in criminal cases to the supreme court of that state upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases . . . it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

In the *Mangum* case, the Court also stated (at 331, 332) that its review to determine whether due process was accorded "must take into consideration the entire course of proceedings in the courts of the state, and not merely a single step in these proceedings." The Court, therefore, considered (see at 343, 344) whether the state appellate court's decision itself violated a provision of the federal Constitution.

Indeed, since the highest state court has construed the indictment as alleging the use by the petitioners of "force and violence to prevent Williams from working," this Court must review the conviction as having been rendered for that crime. *Cf. DeJonge v. Oregon, supra; Herndon v. Lowry, supra.*

The petitioners, therefore, were convicted by state action of using force and violence to prevent Williams from working. It is evident, however, that the information gave no fair notice that such a crime was charged. Hence the petitioners were convicted of a charge not made and thereby were denied due process.

What is more, the petitioners were lulled by state action into a failure to defend themselves from the charges on which they were eventually convicted. The information not only fails to charge petitioners with the use of violence against

Williams but actually ascribes that conduct to another individual, Campbell. The petitioners, moreover, had originally been indicted for violating section 1 of Act 193 by using force and violence against Williams (R. 6). Their conviction under this indictment was set aside by the Supreme Court of Arkansas itself. *Cole et al. v. State*, 196 S. W. (2d) 582. The opinion in that decision went on the basis that evidence had been erroneously admitted. An examination of the opinion makes it clear, however, that its statement of reasons was an inartistic description, and that the reversal was tantamount to a judgment that the evidence did not sustain the verdict. The evidence which the court held should have been "excluded" was all the evidence regarding the defendants' conduct, and the vice was not that any part of it was irrelevant and prejudicial, but rather that in its totality it failed to make out a case under section 1 of Act 193. The trial court's dismissal of the indictment under section 1 (R. 2) and the issuance of the information under section 2 were both recognitions of this circumstance.

Yet the appellate court, in a proceeding brought only under section 2, affirmed under section 1 convictions which, it had previously held, could not be sustained under section 1 on the identical evidence.

We submit that this remarkable course followed by the Supreme Court of Arkansas violates the Fourteenth Amendment. It offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," and it "falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process." *Adamson v. California*, 332 U. S. —, 91 L. Ed. 1464, 1477 (Mr. Justice Frankfurter, concurring), 1506 (Mr. Justice Murphy, dissenting).

The state court's refusal to review the conviction under the statutory section under which it was actually obtained deprived the petitioners not only of due process but also of the equal protection of the state laws. A refusal to allow an appeal to some persons while permitting it to others convicted of the same offense violates this clause of the Fourteenth

Amendment. *Cf. Cochran v. Kansas*, 316 U. S. 255; *Hysler v. Florida*, 215 U. S. 420, 422, 423. By misconstruing the indictment, the Supreme Court of Arkansas in effect denied to petitioners an appellate review of the sufficiency of the evidence to support the verdict. Yet it gives such a review to others convicted under Act 193. *E. g., Smith et al. v. State*, 207 Ark. 104, 179 S. W. (2d) 195. It also denied to petitioners the right it accords others to appeal on grounds of the unconstitutionality of the statute under which they were convicted. It also deprived them of the right to have the jury pass on the facts, since the jury clearly never found that the defendants had used force and violence against Williams. Yet the right to trial by jury is accorded others by article II, section 10, of the state Constitution.

IV. Act 193 violates the Fourteenth Ammendment by making certain acts, which otherwise are misdemeanors, felonious merely because they are committed in aid of striking workmen.

Under Arkansas law, a simple assault and battery is a misdemeanor punishable only by a fine not exceeding $200. 1 Pope's Dig. Stats. Ark. (1937) secs. 2959 and 2923. Even an assault with a deadly weapon is only a misdemeanor, subject to a fine of $50 to $100 and imprisonment not exceeding one year. *Id.* sec. 2960. Assembling for the purpose of disturbing the public peace or committing any unlawful act is a misdemeanor, carrying a penalty of a fine of $10 to $100 and imprisonment of one to three months in the county jail. *Id.* sec. 3477.

If the very same acts proscribed by these statutes are committed in an excessively zealous attempt to assist the effectiveness of a strike, they become felonious under Act 193, subject to imprisonment in the state penitentiary for not less than one year nor more than two years. A thug hired as a strike-breaker who assaults a striker or contrives a disorderly assembly in order to make or induce strikers to return to work is, however, guilty only of a misdemeanor.

The distinction in treatment, here apparent, turns only on which side of the economic controversy is sponsored by the

offender. If he is promoting an employer's interest, his conduct is penalized less than if he is promoting employees' interests.

Accordingly, the only possible rationalization of this discrimination is that the weight of Arkansas state policy is on the side of employers in controversies with employees. And this orientation holds true regardless of the merits and ethics of the controversy and regardless of the public interests involved, whether the dispute was provoked by the employer, whether the employer brutally exploits his workmen, whether he uses force against them, and whether he violates federal and state law in his dealings with them. The statute is not merely an unperfected instrument to deal with violence arising from tumultuous labor relations. It requires little sophistication to recognize that Act 193 is not an anti-violence statute at all; it is an anti-labor statute. Neither Arkansas nor Texas, from whom Arkansas copied (Art. 1621b, Texas Penal Code, as amended by c. 100, Acts 1941), had any rational basis for an assumption that in labor disputes strikers pose a greater threat to the state's peace than do employers or non-strikers. The voluminous reports of the LaFollette Committee and the archives of the National Labor Relations Board indicate the contrary. And in any case, the statute has no machinery for accommodating itself to whatever may be the real threat to order in the situation created by a particular dispute.

The state has not here legislated a heavier penality against violence in labor disputes than it provides against violence in other connections. Such legislation might be a reasonable classification and a valid exercise of the police power. Act 193, however, is simply a case of the state's supporting one side of the quarrel without reference to the merits.

When the Negro employees of the Southern Cotton Oil Company in North Little Rock assembled while on strike, they menaced not the peace of Arkansas but the policy expressed in Act 193 that workmen should not be able to unite effectively against exploitation. Act 193 was used here to hinder persons who already are in a depressed economic and racial status from effectively uniting to better their condition. The vagueness of the statute furthers the underlying anti-

labor policy by causing intimidation of the exercise of rights which, under a clearer statute, would be seen to be unimpaired.

The application of the policy which underlies Act 193 is, we submit, a deprivation of due process and the equal protection of the laws.

If the Act is simply directed against industrial violence, then the classification it accomplishes of strikers on the one hand and employers and non-strikers on the other, bears no reasonable relation to the asserted legislative objective, and hence violates the equal protection of laws clause. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 429; *Gulf, C. & S. R. Co. v. Ellis*, 165 U. S. 150, 160, 161; *Skinner v. Oklahoma*, 316 U. S. 535. But if the objective of the Act is to throw the weight of the state against labor, without reference to any public interest, then it is an oppressive and discriminatory exercise of power which violates both due process and the equal protection of laws. The Act, in that case, can be sustained only if the following proposition is valid: the handicapping of labor is *per se* a legitimate objective for the exercise of state authority. Such a concept of government's functions is alien to our constitutional traditions.

CONCLUSION

The judgment below should be reversed, with directions that the information be dismissed.

Respectfully submitted,

LEE PRESSMAN,
General Counsel, Congress of Industrial Organizations,
718 Jackson Place, N. W.,
Washington, D. C.,
DAVID REIN,
General Counsel, Food, Tobacco, Agricultural and Allied Workers of America (CIO),
JOSEPH FORER,
GREENBERG, FORER & REIN,
1105 K Street, N. W.,
Washington, D. C.,
Counsel for Petitioners.

APPENDIX

Act 193, Acts of Arkansas 1943

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.

FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

ROY COLE AND LOUIS JONES ..... *Petitioners*

v. No. 373.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

GUY E. WILLIAMS
Attorney General of Arkansas

OSCAR E. ELLIS
Assistant Attorney General of Arkansas

State Capitol, Little Rock, Arkansas
Attorneys for Respondent

PARAGON PRINTING CO., LITTLE ROCK

INDEX

Cases Cited

Statutes and Constitution Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

ROY COLE AND LOUIS JONES ..... *Petitioners*

v. No. 373

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

STATEMENT

The Petitioners, Roy Cole and Louis Jones, were convicted for a violation of Section 1 of Act 193 of 1943. They now attack the constitutionality thereof, contending that it violates the Constitution of the United States. Act 193 of 1943 is an Act of five sections, the first two of which are as follows:

> "Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to pre-

vent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

"Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall tiary for not less than one (1) year, nor more than two (2) years."

Section 3 of the Act defines a "labor dispute."

Section 4 of the Act provides that it is cumulative to all other existing articles of the Penal Code.

Section 5 of the Act is a severability clause and is in the usual form for such a clause.

ARGUMENT

This Act was first before the Supreme Court of the State of Arkansas in the case of *Smith and Brown* v. *State*, 207 Ark. 104, 179 S.W. (2d) 185. In that case the constitutionality of Section 1 of Act 193 of 1943 was sustained and the authorities for the Court so holding are cited in that opinion.

The next was before the Supreme Court of Arkansas in *Guerin et al* v. *State*, 209 Ark. 1082, 193 S.W. (2d) 977, and the constitutionality was again sustained and the case of *Smith and Brown* v. *State*, was cited as a reason therefor.

The next time this Act was before the Court was in the case of *Cole, Jones and Bean* v. *State*, 210 Ark. 433, 196 S.W. (2d) 582. In that case the *Smith and Brown* and the *Guerin* cases were cited with approval, and the case was reversed because of error in admitting testimony. It was held, however, that Section 1 of Act 193 of 1943 states two separate offenses. Upon a remand of the case by the Supreme Court of Arkansas through the Circuit Court, it was again tried before a jury and a verdict of conviction obtained. Upon again being appealed to the Supreme Court, it was affirmed as to Cole and Jones, but reversed as to Bean. Cole and Jones, the petitioners, have brought the case here. No other case or cases have been before the Arkansas Supreme Court in which any part of Act 193 of 1943 of the Arkansas Legislature has been construed.

All the convictions in all these cases, which have been sustained, were sustained under Section 1 of Act 193 of 1943. At no time has the Arkansas State Supreme Court construed nor sustained Section 2 of Act 193 of 1943 or any other part thereof other than Section 1 thereof.

For this Court to construe any portion of said Act, other than Section 1 thereof, in advance of and prior to a construction thereof and the upholding of a conviction based on such other portion by the Arkansas State Supreme Court, would be, it appears to us, improper. In other words, we think before any statute or portion thereof of a state statute should be inquired into by this Court that such statute or portion thereof under attack or inquiry here should have been first under attack or inquiry by the highest Court of the enacting State and by said Court sustaining as not offending any portion of the Federal Constitution and therefore not presenting any Federal Question.

In each and all the cases before the Arkansas State Supreme Court, as before mentioned, only Section 1 of Act 193 was construed, applied and held to be constitutional. No other portion of said Act was involved.

In the opinion of the Arkansas State Supreme Court in the case now before this Court is this controlling, it seems to us, statement:

> "Information in the instant case, while charging Cole, Bean and Jones violated the quoted provision of Sec. 2 of the Act (meaning Act 193 of 1943), also accused them of using force and vio-

lence to prevent Williams from working. The use of force or violence, or threat of the use of force or violence, is made unlawful by Section 1.

"Third. (b) In view of the fact that the judgments as to Cole and Jones are affirmed without *invoking any part of Section 2 of the Act*, (meaning Act 193 of 1943) *it is not necessary to discuss the construction appellants think the facts do not sustain.*"

It is then to be noted that the sustaining of the conviction of Cole and Jones was by the Supreme Court of Arkansas sustained solely by and placed squarely upon a violation of Section 1 of Said Act 193 of 1943. It is undisputably a State question and presents no Federal question in this connection. Therefore, we reach the conclusion and contend the only proper inquiry here is, Does Section 1 of Act 193 of 1943 Arkansas Legislature offend against any provision of the Constitution of the United States. We can think it does.

We now address ourselves to a consideration of that question. Section 1 of the Act which has been before quoted is in words as follows:

"It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by

confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years."

Arkansas has had since 1907 a statute, in many respects, very similar to this Section 1 of Act 193 of 1943. It is now Section 3482 of Pope's Digest of the Statutes of Arkansas and is an Act of May 17, 1907, page 809, of that year's Session Acts. This Section is:

"Section 3482. DRAWING DEADLY WEAPONS—THREATS. Every person and the aiders and abetters of every person who shall draw a pistol, gun or any other deadly weapon upon any other person or shall serve or give notice either verbal or in writing to any other person or shall place notice upon the door or about the premises of any other person for the purpose of frightening or intimidating him from doing any lawful act, when such person drawing said pistol or gun or other deadly weapon is not justified in self-defense for so doing, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars and shall be imprisoned in the county jail for twelve months."

The main distinguishing features of that Act and the one now considered is the 1907 Act which makes violation thereof a misdemeanor, while the 1943 Act makes it a felony. Surely the states under the constitution have the right to provide what acts committed within each shall constitute a misdemeanor and which a felony. In other words, they may in the wisdom of the Legislature raise an act from the ranks of a misdemeanor to that

of a felony. No one has ever dared to attack the validity of the Act of May 17, 1907, cited above as Section 3482 of Pope's Digest.

Violence inflicted on the person of another constituted the crime of assault and battery at the common law. *State* v. *Leather*, 31 Ark. 444.

> "The crime of assault and battery, both at the common law and under our general criminal statutes, is a misdemeanor.
>
> "The purpose of Section 1 of Act 193 was to make an assault and battery a felony where it is committed against a person for the purpose of preventing him from engaging in a lawful vocation. In the judgment of the legislature the added element—preventing a person from engaging in a lawful vocation—invested assaults and batteries with an effect much more injurious to the public at large than assaults and batteries which were personal, so to speak, to the parties involved. Preventing the citizens of the state from engaging in lawful vocations might inflict the most serious consequences on the general public, and justified the legislature in classifying assaults and batteries committed for the purpose of preventing persons from demeanors.
>
> "In providing that assaults and batteries committed fo rthe purpose of preventing persons from engaging in lawful vocations should constitute felonies, punishable by confinement in the penitentiary, the legislature was not required to make all assaults

and batteries felonies. The legislature had a perfect right to classify assaults and batteries, and to make only those which involved the element of preventing persons from engaging in lawful vocations felonies, leaving all other assaults and batteries as misdemeanors. The classification is not obnoxious to the equal protection clauses of the state and federal constitutions.

"'The statute does not violate the equal protection clause merely because it is not embracing * * * A state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. * * * The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature co-extensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine. * * * *,'"

The Criminal Court of Appeals of Texas in *ex parte Frye*, 156 S.W. (2d) 531, said as follows:

"Relator also contends that the statute in question denies him the equal protection of the law and he seeks to illustrate his contention by making the following observation: If A strikes B, who is engaged in a lawful occupation in order to prevent or attempt to prevent him from engaging in a lawful vocation, he is guilty of a felony. Yet, if B strikes A, who is not so engaged, he is merely guilty of a misdemeanor. Hence, the unequal protection of the

law. To the casual observer this reasoning may seem plausible but a critical analysis will lead one to the discovery of a more far-reaching objective in the two offenses. When B assaults A, who is not engaged in a gainful occupation, the assault is directed primarily against the person, while A, who assaults B, who is engaged in a gainful occupation, the assault is not only directed against the person but against his vocation for the purpose of preventing B from pursuing his occupation and to deprive him from the fruits of his labor. It is obvious that the assault by A upon B under the circumstances stated, not only deprives B of his labor but in a measure affects the entire economic fabric of the country. Hence the act of A passes into a more serious class and justifies a greater punishment than the act of B. To hold that the law in question is in contravention of the Federal Constitution on the ground of unequal protection of the law would be creating a fertile ground from which an attack might be made on the law relating to robbery. A, who makes an assault upon B for the purpose of depriving him of some personal property, is guilty of a felony, but if B, who assaults A, who has no personal property deprives him of nothing and does not intend to deprive him of anything, and is therefore merely guilty of a misdemeanor. It is obvious that the classification of the offenses and the penalty prescribed for each is a reasonable exercise of legislative functions within the purview of the Constitution."

"The State has the power to determine what acts committed shall be deemed criminal." *Huff* v. *State*, 164 Ark. 211.

The State of Michigan has a statute as follows:

> "Any person or persons who shall by threats, intimidations, or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer, in the quiet and peaceable pursuit of his lawful avocation, shall be guilty of a misdemeanor."

The Supreme Court of Michigan in sustaining the validity of the above statute said:

> "Our statute makes no distinction between the representative of the labor union and an individual. The right of Labor to strike is of course not affected by the statute under consideration, yet its terms providing that any person or persons who shall without authority of law interfere with any mechanic or other laborer in the pursuit of his lawful avocation is sufficiently broad to prevent individual interference with the right to work as well as organized effort. The statute is a lawful enactment of the legislature and a proper exercise of the police power of the state." *People* v. *Washburn*, 285 Mich. 119, 280 N.W. 132.

Wisconsin has a statute very similar to the one under investigation here and to the Michigan statute, which was upheld in *Fischer* v. *State*, 76 N.W. 594:

"The power and the duty of the state to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted."

Thornhill v. *State of Alabama*, 310 U. S. 88, 60 Sup. Ct. 736.

"We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. • • • • •

"The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence which induced it and only so long as it counteracts a continuing intimidation. • • • • •

"Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence."

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 61 Sup. Ct. 552. See also *Hotel & Restaurant Employees* v. *Wisconsin Employment Relations Board*, 295 N.W. 634. Affirmed: S. C. 315 U. S. 437, 62 Sup. Ct. 706.

In *Rowekamp* v. *Mercantile-Commerce Bank & Trust Company*, 72 F. (2d) 852, the Court of Appeals for the Eighth Circuit said:

> "There are certain inherent powers in the government to enact laws to protect order, safety, health and general welfare of society. This power, frequently referred to as the police power, has been said to be as broad as the *public welfare*. It is an inherent attribute of sovereignty with which the State is endowed for *the protection and general welfare of its citizens*, and of which the state may not deprive itself."

> "The legislature of the state has power to determine primarily what measures are appropriate or needful for the protection of the public morals, public health or public safety, subject to judicial review."

Williams v. *State of Arkansas*, 217 U. S. 79, 30 Sup. Ct. 493, involved a statute of this state locally known as the "Hot Springs Drumming Statute". This Court, in opinion of Judge McCulloch, sustained it as a proper exercise of the police power. The Supreme Court said:

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant

in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

Quoting from a former decision, the Court advertised to the principle that the liberty secured by the Federal constitution did not import an absolute right to be freed from restraint at all times, and in all circumstances; that there are manifold restraints to which every person must necessarily be subjected for the common good and then further said:

"The legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views, inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * * * *

"If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be unwise exertion of the authority vested in the legislative branch of the government."

Only Section 1 of Act 193
Is Here Involved

Under the common law, violence inflicted on the person of another was deemed an assault and battery and punished as a misdemeanor. *State* v. *Leathers*, 31 Ark. 44.

Section 1, Act 193, is designed to expand the common law crime where acts be committed in the manner, and in the circumstances, specified. Of course, it is to be conclusively presumed that the Legislature, in the exercise of its wisdom and discretion, found, and determined, that assaults so committed were more detrimental in effect on the public peace and general welfare than those ordinary in character; that prevention thereof would further the public welfare, and that the imposition of a greater penalty would have deterrent effect, all of which formed the basis for, and justified, classification. Therefore, in the circumstances, classification would not be obnoxious to the equal protection guarantees of either the State or Federal Constitutions for the reason that it was based on real and substantial differences.

> "It (Fourteenth Amendment) does not prevent a State from adjusting its legislation to differ in situation, or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on a real substantial difference, having a reasonable relation to the subject of the particular legislation."

Power Mfg. Co. v. *Saunders*, 274 U. S. 490, 47 S. Ct. 678;

Kelso v. *Bush*, 191 Ark. 1044;

Whitney v. *California*, 274 U. S. 357, 47 S. Ct. 641.

In the last cited case, the Court said:

> "It is settled by repeated decisions of this Court that the equal protection clause did not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and, therefore, is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Section One is a Valid Exercise of the Police Power

Section 1 of Act 193 declares that it shall be *unlawful* for any person "by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this state." We are concerned with the effect of this Section alone, tested by the provisions of the Federal and State constitutions.

The Supreme Court of the United States has consistently held that the construction of a state statute by the highest court hereof affords an interpretation of its scope and meaning, from which the validity of the statute, under the Federal constitution, is to be considered and determined in its application and administration. Citation

is deemed unnecessary. Moreover, the state court interpretation will not be disregarded by the Supreme Court and a different construction placed thereon which would render it repugnant to the Federal Constitution unless its natural context and administration are so repugnant to the organic law. In other words, the Supreme Court is concerned solely with the effect and operation of the law as enforced by the state and whether the *effect thereof* is violative of the Federal Constitution. Likewise, under decisions of the Supreme Court it is settled that the Fourteenth Amendment does not destroy the power of the state to enact proper police legislation as to subjects within state control.

It is also fundamental that one's employment, trade or calling is a property right, and that the wrongful interference therewith is an actionable wrong; that, therefore, a person's business is property and if lawfully conducted is entitled to protection from unlawful interference.

Truax et al v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124;

International News Service v. *Associated Press*, 248 U. S. 215, 319 S. Ct. 68;

Mlik Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552.

When the Federal Constitution is invoked in an endeavor to overthrow legislation designed to protect a person's trade, calling or business, generally speaking, the fundamental question to be answered is whether there has been a fair, reasonable and appropriate exercise of the police power of the state, or, on the other hand, whether there is an arbitrary interference with the right of the

individual. But, in the instant case, the single question presented is whether it is within the power of the state, within constitutional limitations, to declare it to be unlawful for any person, by the use of force or violence, or threat thereof, to prevent or attempt to prevent any person from engaging in an activity which is *his by right*, and which the State, under the police power is, therefore, *in duty bound to protect*.

In the enactment of Act 193, the legislature did naught more than declare that certain acts should be unlawful, which were, prior to legislative declaration, considered and deemed unlawful at common law. Assuredly, there can be no doubt of the power vested in state legislative bodies to define what Acts shall constitute criminal offenses and fix the penalty therefor. Nor is there any doubt of the legislative power to enact laws deemed expedient for the protection of public and private rights and the prevention and punishment of public wrongs. Necessarily, so long as such enactments do not infringe constitutional rights and privileges, express or necessarily implied, the legislative will is absolute.

This Court, in *Huff* v. *State*, 164 Ark. 211, spoke very definitely in this respect in a sentence containing but two lines:

> "It is for the state to determine what acts committed within its limitations shall be deemed criminal."

Under Section 1, Act 193 of the use of "force or violence", or the threat thereof, in an attempt to prevent any person from pursuing his lawful vocation is the very

cornerstone and foundation of the statutory crime; and by the use of such terminology the Legislature implicitly recognized the distinction between the right of a person to legitimately endeavor to persuade, or prevail upon, another not to engage in a given activity, and an unlawful endeavor to proceed by force. This Court has heretofore given approval to the distinction in holding, in *Local Union*, 313 v. *Stathakis*, 135 Ark. 86, that "strikers" have the right to apprise the public of their complaints against an employer, and solicit both the support of the public as well as union members, in any legitimate attempt to prevail in their controversy. But, on the other hand, it was there said that it was well settled and uniformly held that "strikers" were without right to resort to force, intimidation or coercion; that publicity, as well as other means of persuasion, were available and lawful, but force, coercion and intimidation was banned.

Again, in *Riggs* v. *Rucker Duck & Rubber Co.*, 196 Ark. 571, Judge Smith (Frank G.) said:

> "The cases all agree in holding that any conduct on the part of the pickets which amounts to coercion is unlawful and will be enjoined."

> "But they may not use force, violence, coercion or intimidation. They must so exercise their rights to strike and to picket as not to interfere with the rights of others."

The Supreme Court of Alabama, in *Lash* v. *State*, decided March 16, 1943, 14 So. (2d) 235, recently upheld the constitutionality of a statute of that State, which provided as follows:

> "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement, or understanding, for the purpose of hindering, delaying or preventing any other persons, firms, corporations, or associations of persons from carrying on any lawful business, shall be guilty of a misdemeanor."

The appellant had been convicted under the statute on facts which showed that he, with others, engaged in picketing certain property of a building contractor erecting dwelling houses thereon. Picketing was maintained by walking beside the premises, carrying signs stating that the contractor was unfair to Union Labor. The complaint filed against the defendant did not allege that he had engaged in any violence, but evidence was introduced to show that acts of violence had attended the picketing. The conviction was appealed to the Court of Appeals of Alabama, which certified to the Supreme Court the question whether the statute was constitutional. The Supreme Court so held, and, thereupon, the Court of Appeals affirmed the conviction.

The Supreme Court held that the phrase, "without just cause and legal excuse" meant "Unlawful", or "violent", (thereby, in effect, converting the language of the statute into the phraseology of the one here involved) and that, when so construed, the statute was a proper exercise of the police power of the State to protect "a person's business * * *" from unlawful interference." The conclusion reached was based on the decision of the United States Supreme Court in the "Meadowmoor Dairies"

case, which declared that a State may authorize its courts to enjoin acts of picketing, in themselves peaceful, if, in fact, they were enmeshed with contemporaneously violent and outlawed conduct.

Petition for certiorari was filed in the Supreme Court and there argued by Mr. Joseph A. Padway, General Counsel for the American Federation of Labor. He contended that the statute, on its face, as applied to the case in hand, unconstitutionally deprived the defendant of freedom of speech and assembly. He argued that the decision of the Supreme Court in the Thornhill case, which construed a former anti-picketing statute of the State, was controlling. But the statute there involved made it a misdemeanor for any person, "without just cause or legal excuse therefor", to "go near to, or loiter about", a place of business for the purpose of "inducing other persons not to trade with * * * * or be employed, by an owner of the business", or to "picket" a place of business for the purpose of "hindering, delaying, or interfering with, or injuring" the business. Mr. Padway contended that the Act involved in the Thornhill case was identical in force and effect with the statute involved in the case then at Bar; that the only distinction between the two Acts was that in the Thornhill case, the statute forbade the doing of certain acts, while in the case under consideration, it forbade a conspiracy to do the same acts.

He further argued that if the Act be upheld, the effect thereof would be to permit the conviction of a person for combining with others to peacefully picket the premises of a non-Union contractor, since defendant was not himself charged with any violence; and he further contended

that (1) if the element of violence was material, "the defendant was denied due process", since no charge of violence was made and (2) the statute was vague and indefinite and insufficient to charge a crime.

In its brief, the State of Alabama argued that the application of the statute had been narrowed by the intertrepation given it by the Supreme Court of that State in holding that only "unlawful", or "violent" acts are within the scope of the statute. Therefore, so construed, the statute did not forbid agreements to picket peacefully and banned only such agreements that involved lawful and violent acts, whether such acts occur as a result of picketing, or otherwise. (The decision of this Court in the Stathakis case was cited as supporting authority.) In other words, the State urged that when the exercise of the right to picket was attended with a context of violence, depredation, and abuse, interference by the State, in the exercise of police power, was legally forthcoming.

The Supreme Court of the United States denied certiorari.

One of the best considered cases (involving the right of free speech) is found in *State* v. *Moilen* (Minn.) 167 N.W. 345, 1 A.L.R. 311, which involved a conviction for criminal syndicalism. The Fourteenth Amendment and State constitutional provisions prohibiting excessive fines or cruel or unusual punishment were invoked by defendant. The Court said:

> "The contention that the statute violates rights granted and secured by the Federal Constitution is without merit. The design and purpose of the

Legislature in the enactment of the statute was the suppression of what was deemed a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism, employed by certain laborers in furtherance of industrial industry and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage and like *in terrorem* methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety, of which the courts will take notice; that they are unlawful, and within the restrictive power of the Legislature, is clear".

"It is the exclusive province of the legislature to declare what acts, deemed by the lawmakers inimical to the public welfare, shall constitute a crime, to prohibit the same, and impose appropriate penalties for violation thereof. With the wisdom and propriety thereof, the courts are not concerned. Judicial consideration of enactments of the kind is limited to the inquiry whether the constitutional rights of the citizens have been invaded or violated. If such rights be in no wise infringed or abridged, the statute must stand, however harsh it may seem to those who run counter to its commands."

In the *Riggs case, supra*, Judge Smith very forcefully said that the law as announced in the *Stathakis case* remained unchanged; that the decision of the Court there was deliberately made on careful consideration, and that coercion, intimidation, force and violence was unlawful in Arkansas. Whether by way of *obiter*, or for purely personal reasons which we deem appropriate and com-

mendable, he was at particular pains to strenuously deny the assertion that the law as declared in the *Stathakis case* was "ancient" and obsolete, declared that it was "based upon the simplest and most elementary principles of right and justice" and had been approvingly cited by many other jurisdictions, to all of which one must agree. In any event, from July, 1918, to June, 1938, the law as declared in the *Stathadis case*, prohibited force or violence on the part of persons, either individually or collectively, when used in such manner as to another, and declared any such activity to be an actionable wrong, which could be restrained and enjoined by legal process. Therefore, the Legislature, in the enactment of Act 193, did naught more than to declare such activities to be a crime and fixed the penalties therefor.

In *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552, the facts were that respondent employed independent contractors to dispense its products, thereby reducing its overhead expense to such an extent that independent contractors, or "vendors", were able to sell the products to dealers for resale to consumers at a rate less than other dairies who employed "Union" laborers to deliver their products. The "Union" brought action against dairies using the "vendor" system and respondent brought suit to enjoin the picketing of dealers handling its products. A Master found existence of violence on a considerable scale. There were more than fifty instances of window-smashing, and explosive bombs caused substantial injury at the Meadowmoor plants. Stench bombs were used, trucks were wrecked, resulting in serious injuries to one driver. Another truck was driven into a river, two were burned, and a store building was set fire. Several persons were se-

verely beaten, and workers were held under guns and severely beaten while being told to join the "Union". The Court held:

> "Peaceful picketing is the working man's means of communication * * * it was in order to avert force and explosions due to restrictions upon rational modes of communications that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution. * * * * *"

> "In this case the Master found 'intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence' and the Supreme Court justified its decision because picketing 'in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that noncompliance would possibly be followed by acts of an unlawful character.'"

> "* * * * The picketing in this case was set in a background of violence * * *. These acts of violence are neither episodes nor isolated * * *. It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of *respondeat superior.*"

The Court reviewed and distinguished *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, and *Carlson* v. *California*, 310 U. S. 106, 60 S. Ct. 746, and said:

> "Entanglements with violence was expressly out of those cases."

In both the *Thornhill case* and the *Carlson case*, it was recognized, and held, that the right to publicize the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must be regarded as within that liberty of communication secured by the Fourteenth Amendment, but it was further said that the power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents was undoubted, and finally disposed of the single question here presented with the following statement:

> "We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation,"

And further said:

> "A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, *the power to deal with coercion due to extensive violence.*"

Counsel for appellants cite but one case, *Thornhill v. Alabama,* to which we have heretofore referred. The Supreme Court cited and distinguished it in the "Meadowmoor Dairies" case. It is without bearing on the case at bar.

We deem it wholly unnecessary to cite, or attempt to analyze and apply, the numerous recent decisions of the Supreme Court involving "free speech". It will suffice to say that in the "Truax" case (257 U. S. 312), the "Senn" case (301 U. S. 468), the "Swing" case (312 U. S. 715) and the "Angelo" case (64 S. Ct. 126), it was reiterated and affirmed that if "the picketing was peaceful, without violence, and without any unlawful act", attempted legislative interference would be violative of the freedom of speech and assembly. On the other hand, however, all of the cases stress the proposition that the term "peaceful" implies not only absence of violence but also absence of any unlawful act, precludes intimidation and any form of physical obstruction or interference with the business, or right to work, of another. Moreover, that when interference with the right to work or the business of another person is attained in any manner other than "peaceful", as defined and delimited, or where violence, force, or the threat thereof, in actuality, are attendant, then, the police power may be properly invoked.

We say, without fear of contradiction, that even during the period of so-called "New Deal Era", there has not been a single decision of the Supreme Court deviating from the axiomatic principle that a state has ample power to "regulate local problems thrown up by modern industry" in order to preserve the peace. More especially does

this power become exercisable in a setting like that here present, where acts of coercion, interference and intimidation are perfectly apparent, and are not within the limits, or influence, of peaceful picketing, which have been proven to the satisfaction of a jury. So, ever and anon, "we come out the same door wherein we went", for, as said by the Supreme Court in *Dorchy* v. *Kansas*, 272 U. S. 306, 47 S. C. 86:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause (language defined and approved in the *Lash* case) is wrongful."

The Legislature of this State, in the exercise of the police power, has seen fit to make such activity a crime.

Constitutional limits do not forbid.

Act 193 is a verbatim copy of an Anti-Violence statute enacted in Texas in 1941. It had been construed by the Supreme Court of that State, and an appeal from the judgment therein rendered to the Supreme Court had been dismissed, on the ground that no Federal question was involved, prior to the date of the enactment of Act 1943. Therefore, the Arkansas Legislature is presumed to have adopted the Texas statute as therefore construed by the Supreme Court of Texas.

In answering the challenge that the Texas statute was violative of the equal protection clauses of both the Texas and Federal Constitutions, the Supreme Court of Texas said:

> "Relator also contends that the statute in question denies him the equal protection of the law and

he seeks to illustrate his contention by making the following observation: "If A strike B, who is engaged in a lawful occupation in order to prevent or attempt to prevent him from engaging in a lawful vocation, he is guilty of a felony. Yet, if B strikes A who is not so engaged, he is merely guilty of a misdemeanor. Hence, the unequal protection of the law. To the casual observer this reasoning may seem plausible, but a critical analysis will lead one to the discovery of a more far-reaching objective in the two offenses. When B assaults A, who is not engaged in a gainful occupation, the assault is directed primarily against the person, while A, who assaults B, who is engaged in a gainful occupation, the assault is not only directed against the person but against his vocation for the purpose of preventing B from pursuing his occupation and to deprive him of the fruits of his labor. It is obvious that the assault by A upon B under the circumstances stated, not only deprives B of his labor but in a measure affects the entire economic fabric of the country. Hence the act of A passes into a more serious class and justifies a greater punishment than the act of B. To hold that the law in question is in contravention of the Federal Constitution on the ground of unequal protection of the law would be creating a fertile ground from which an attack might be made on the law relating to robbery. A, who makes an assault upon B for the purpose of depriving him of some personal property, is guilty of a felony, but if B, who assaults A, who has no personal property deprives him of nothing and does not intend to deprive him of anything,

and therefore merely guilty of a misdemeanor. It is obvious that the classification of the offenses and the penalty prescribed for each is a reasonable exercise of legislative functions within the purview of the Constitution."

Ex parte Frye, 156 S. W. (2d) 531.

As heretofore stated, we again stress the proposition that no part of Act 193 other than Section 1 thereof, is here involved; that it does not strike at, or in any wise threaten, lawful activities of labor organizations. In design and purpose, it merely affords additional protection, by way of a greater degree of punishment, to the right of one person to work, or pursue his vocation, *sans* violence or threat thereof on the part of any other person. It does not prescribe, or punish, any activity whatsoever on the part of organized labor.

Criminal liability for acts of intimidation or coercion affecting Labor has been specially provided for by statute in several jurisdictions. An extensive annotation may be found in 123 A.L.R. at page 316, *et seq.*, following the reported decision in *People of Michigan* v. *Warshburn* in the same volume on page 311. The statute there construed provided:

"Any person, or persons, who shall by threats, intimidations, or otherwise, and without authority of law, interfere with or in any way molest or attempt to interfere with or in any way molest or disturb, without such authority, any mechanic or other laborer in the quiet and peaceable pursuit of his lawful avocation, shall be guilty of a misdemeanor."

In a unanimous opinion, the Court cited with approval *Fischer* v. *State*, 101 Wis. 23, wherein a statute of that State, as follows:

> "Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in, or continuing in, any lawful work or employment, either for himself or as a wageworker, or who shall attempt to so hinder, or prevent, shall be punished," etc.,

was upheld and then, speaking of the statute then before the Court, further said:

> "The right of Labor to strike is, of course, not affected by the statute under consideration, yet its terms, providing that any person or persons who shall, without authority of law, interfere with any mechanic or other laborer in the pursuit of his lawful avocation, is sufficiently broad to prevent individual interference with the right to work as well as organize effort. The statutes is a lawful enactment of the Legislature and a proper exercise of the police power of the State."

There are no Constitutional guarantees protecting one in the commission of acts of violence. But there are constitutional provisions affording protection against acts of violence. Moreover, it is a posttive duty of the State, in proper exercise of the police power, to provide such protection. All fundamental rights comprised within the term "liberty" are protected by Constitutional provisions, and, unless and until unwarranted invasion of these rights be properly penalized by the State, in the exercise

of the police power, to that extent the State fails in Governmental duty. We again quote from the *Whitney case, supra*:

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunities from every possible use of language and preventing the punishment of those who abuse this freedom, and that a State, in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized Government and threaten its overthrow by unlawful means, is not open to question."

In the determination of the single question here presented the distinction between Sections One and Two of the Act, involving the legislative intent and purpose, and, therefore, the meaning and application of the separate sections, must be constantly kept in mind. Too much stress cannot be laid upon the distinctive provisions of the two sections. The legislative intent in both is perfectly apparent. Section Two is designed to prevent an "unlawful assembly" in the vicinity where a "labor dispute", as defined, exists, and threat, by the use of "force or violence", prevent or attempt to prevent, any other person from engaging in lawful vocation or to promote, encourage or aid any such unlawful assemblage. Therefore, the gravamen of the offense is "unlawful", rather than, "peaceful picketing". The offense proscribed by Section One is not in any wise related to that defined in Section

Two, is entirely disassociated therefrom, and the line of demarcation is "as wide and deep as Mercutio's wound". Moreover, "peaceful picketing" is thereby implicitly recognized as being a lawful activity, but, by that very token, that which may be done by organized effort under the aegis of lawful "peaceful picketing" would not thereby confer an unbridled license on "any person" acting on his own initiative by way of assumed right, or privilege, to do that which Section One of the Act expressly forbids. Stating the proposition a bit differently: "Organized Labor", or any other combination of persons, may not be denied the right to picket peacefully; but recognition of, and protection for, that lawful right would not confer on an individual the right, or privilege, to maliciously injure or destroy the business, or interfere with the vocation, of another person, by acts which serve no legitimate purpose of his own, as distinguished from such rights, or privileges which he may enjoy as a member of an organization. In the instant case there is not the slightest intimation that "Organized Labor", as such, was involved. In fact, the very contrary was proven, and the factual setting merely showed that appellants, acting in their private capacity, so to speak, went on the premises of another and not only violently and forcibly interfered with the right of Mr. Dickey in the pursuit of his business, but likewise interfered with the right of his employees to work for him. Their individual effort in this behalf was, therefore, we reiterate, entirely without the realm of "peaceful picketing", an endeavor to accomplish an unlawful purpose, strictly banned by Section One of the Act. Assuredly, the right of Mr. Dickey to make a contract with the owner of the building to paint it—his right to work—is a fundamental one, constitutionally guaranteed; and any

attempt to deprive him of that right, outside the realm of "peaceful picketing" would necessarily be unlawful. *A fortiori,* the State, in the exercise of the police power, is vested with authority, and is in duty bound, to protect it.

The Arkansas Act 193 of 1943 is an exact or verbatim copy of the Texas statute, Art. 1621B of Texas Penal Code as amended by Chapter 100, Acts of 1947 Legislature, Regular Session, Vernon's Am. P. C. Art. 1621b, except the Texas statute carries an emergency clause, whereas, the Arkansas statute, Act 193 of 1943, does not.

December 10, 1941, prior to the enactment of the Arkansas statute, Act 193 of 1943, the Court of Appeals of Texas sustained of the Texas statute, as referred to before by me, in *ex parte Frye,* 143 Texas Criminal Reports 9, 156 S.W. (2d) 531. On the same day the same Texas Court sustained the same Texas Statute in *Ex Parte Sanford,* 144 Texas Criminal Reports 430, 157 S. W. (2d) 899, on the authority of the Frye case then decided.

The Sanford case was appealed to this Court, where this Court dismissed it on the ground it did not involve a Federal question. *Sanford* v. *Hill,* 316 U. S. 647, 62 Sup. Ct. 1292, 86 L. Ed. 1731.

We then next inquire if a Federal question is presented here.

We now insist that under the *Sanford* v. *Hill* case, 316 U. S. 647, 62 Sup. Ct. 1292, 86 L. Ed. 1731, no relief can be afforded petitioners.

In construing the Texas statute before referred to and which is, as before mentioned, an exact or verbatim

copy of the Arkansas statute, Act 193 of 1943, now involved and being examined, a *per curiam* opinion as follows was given:

No. 1187, *Sanford* v. *Hill, Sheriff*, appeal from the Criminal Court of Appeals of Texas, June 1, 1942, *per curiam;* the appeal is dismissed for want of a substantial Federal question. *Gorin* v. *United States*, 312 U. S. 19, 27-28; *Hotel & Restaurant Employees' International Alliance* v. *Wisconsin Employment Relations Board*, 315 U. S. 437. Mr. Sewell Meyer for appellant represented below: 157 S.W. (2d) 899:

In the *Hotel & Restaurant Employees' International Alliance, Local* 122, *et al* v. *Wisconsin Employment Relations Board, et al*, 315 U. S. 437, cited by the Court as authority for the order in the *Sanford* v. *Hale*, 316 U. S. 647, this Court said:

> "The Wisconsin Statute underlying this controversy was enacted as a comprehensive code governing the relations between employers and employees in the State. Only a few of its many provisions are relevant here. Section 111.06 provides it shall be 'an Unfair Labor Practice' to 'cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike', and to 'hinder or prevent, by mass picketing, threats, initmidations, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with the

entrance to or egress from any place of employment, or to obstruct or interfere with the free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.' The Act contains a provision expressly dealing with its construction; 'Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech.' Section 111.15.

"The central attack against the order is that, as enforced by Wisconsin Courts, it enjoins peaceful picketing. Whether Wisconsin has denied the petitioners any rights under the Federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a re-hearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court of course has the final say concerning the meaning of the Wisconsin law and the scope of administrative orders made under it.

"*Aikins* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers' Union*, 301 U. S. 468. What is before us, therefore, is not the order of an isolated self-

contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. And that Court has unambiguously rejected the construction upon which the claim of the petitioners rests. That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the Court; 'The Act does not limit the right of an employee to speak freely * * *.' The term 'picketing' as used in (the Act) does not include acts held in the Thornhill case, *supra,* to be within the protection of the constitutional guarantee of the right of free speech. The expressed language of the Act forbids such a construction. It clearly refers to that kind of picketing which the Thornhill case says the state has power to deal with. 'As a part of its power to preserve the peace and protect the privacy, the lives and the property of its residents' * * * * *. In this case it is undisputed that the numerous assaults were permitted by the pickets. That the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist * * *'. And on re-hearing; 'under the statutes and the order of the board as interpreted and construed by the explicit language of the (previous) opinion, freedom of speech and the right peaceably to picket

is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in * * * * *. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the Board. 326 Wis. 329, *Passim.*

"What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to say, so long as rights guaranteed by the Constitution are respected.

"*Aikins* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers' Union*, 301 U. S. 468.

"As the order and appropriate provisions of the statute upon which it was based leaves the petitioners freedom of speech unimpaired, the judgment below, must be affirmed."

PETITIONER'S ARGUMENT

The petitioners herein in their Brief under the heading of "Argument" urge four reasons for the relief which they ask.

These four assigned and urged reasons have been sufficiently dealt with and our position supported by the authorities cited by us under the heading of "Argument" herein used by us. However, we shall use here the same four headings as used by petitioners and again briefly state our position and contention.

I

The Statute and the Conviction Thereunder Violate the Fourteenth Amendment by Prohibiting Free Speech and Assembly and by Imputing Guilt for Another's Acts

Suffice it to say we think this contention has been fully answered before herein and sufficiently supported by the cited authorities. The Act nowhere interferes with free speech and assembly. It is leveled at and makes it unlawful to use force or violence, or threat of force and violence. This in no way violates the right of free speech and assembly.

II

The Statute is in Conflict with the Fourteenth Amendment Because of Its Vagueness

There can be no merit to this contention, it appears to us. The Act is definite and certain in terms as to the acts prohibited and made unlawful.

III

The Supreme Court of Arkansas Violated the Fourteenth Amendment by Affirming Under a Statute for Violation of Which the Petitioners Had Not Been Charged

The matter presented by this contention is a matter solely left to the state's procedure and laws and presents to this Court no Federal Question. The information presented a charge under Section 1 of Act 193 of 1943 Arkansas Legislature and its contents so show and the Arkansas Supreme Court so found. This is purely a State question.

IV

Act 193 Violates the Fourteenth Amendment by Making Certain Acts, Which Otherwise Are Misdemeanors, Felonies Merely Because They Are Committed in Aid of Striking Workmen

It is clearly within the right of the various states as to what Acts committed within it are misdemeanors or felonies. The Fourteenth Amendment is not violated when Arkansas raises a misdemeanor formally by a statute to the rank or degree of a felony. This was done by Act 193.

CONCLUSION

Act 193 was a proper enactment and did not violate Amendment Fourteen nor any other constitutional guarantee and therefore presents no Federal Question and the case should be affirmed.

Respectfully submitted

GUY E. WILLIAMS
Attorney General of Arkansas

OSCAR E. ELLIS
Assistant Attorney General of Arkansas

State Capitol
Little Rock, Arkansas

Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES

No. 373.—October Term, 1947.

Roy Cole and Louis Jones, Petitioners, v. State of Arkansas. | On Writ of Certiorari to the Supreme Court of Arkansas.

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The petitioners were convicted of a felony in an Arkansas state court and sentenced to serve one year in the state penitentiary. The State Supreme Court affirmed, one judge dissenting on the ground that the evidence was insufficient to sustain the convictions. — Ark. —, 202 S. W. 2d 770. A petition for certiorari here alleged deprivation of important rights guaranteed by the Fourteenth Amendment. We granted certiorari because the record indicated that at least one of the questions presented was substantial. That question, in the present state of the record, is the only one we find it appropriate to consider. The question is: "Were the petitioners denied due process of law . . . in violation of the Fourteenth Amendment by the circumstance that their convictions were affirmed under a criminal statute for violation of which they had not been charged"?

The present convictions are under an information. The petitioners urge that the information charged them with a violation of § 2 of Act 193 of the 1943 Arkansas Legislature and that they were tried and convicted of violating only § 2. The State Supreme Court affirmed their convictions on the ground that the information had charged and the evidence had shown that the petitioners had violated § 1 of the Arkansas Act which describes an offense separate and distinct from the offense described in § 2.

The information charged:

> ". . . Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean,[1] in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with eath [*sic*] other, promote, encourage and aid such unlawful assemblage against the peace and dignity of the State of Arkansas."

The foregoing language describing the offense charged in the information is substantially identical with the following language of § 2 of the Arkansas Act. That section provides:

> "It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent . . . any person from engaging in any lawful vocation, or for any person acting . . . in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage."

The record indicates that at the request of the prosecuting attorney, the trial judge read § 2 to the jury. He then instructed them that § 2 "includes two offenses, first, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defend-

[1] The State Supreme Court held that Bean's conviction was based on insufficient evidence, reversed his conviction, and directed that the cause be dismissed as to him.

ants as is charged in the information here. The latter offense is the one on trial in this case."

The trial court also instructed the jury that they could not convict petitioners unless "convinced beyond a reasonable doubt that they promoted, encouraged, and aided in an unlawful assemblage at the plant of the Southern Cotton Oil Company, for the purpose of preventing Otha Williams from engaging in a lawful vocation." This instruction, like the preceding one, told the jury that the trial of petitioners was for violation of § 2, since § 2 makes an unlawful assemblage an ingredient of the offense it defines and § 1 [2] does not. Thus the petitioners were clearly tried and convicted by the jury for promoting an unlawful assemblage made an offense by § 2, and were not tried for the offense of using force and violence as described in § 1.[3]

When the case reached the State Supreme Court on appeal, that court recognized that the information as drawn did include a charge that petitioners violated § 2 of the Act. That court also held that the information accused petitioners of "using force and violence to prevent Williams from working," and that the "use of force or violence, or threat of force or violence is made unlawful by Sec. 1." For this reason the Supreme Court said that it affirmed the convictions of the petitioners "without invoking any part of Sec. 2 of the Act . . . ." That court

---

[2] "Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years." Act 193, Arkansas Acts of 1943.

[3] A previous conviction of petitioners under an indictment charging them with a violation of § 1 was set aside by the State Supreme Court because of the erroneous admission of evidence by the trial court. *Cole et al. v. State*, — Ark. —, 196 S. W. 2d 582.

accordingly refused to pass upon petitioners' federal constitutional challenges to § 2. It later denied a petition for rehearing in which petitioners argued: "To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the 14th Amendment to the United States Constitution."

We therefore have this situation. The petitioners read the information as charging them with an offense under § 2 of the Act, the language of which the information had used. The trial judge construed the information as charging an offense under § 2. He instructed the jury to that effect. He charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense "of using force and violence." Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in § 1.[4] Yet the State Supreme Court refused to consider the validity of the conviction under § 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted.

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of

---

[4] "Under any reasonable construction Section 1 creates separate offenses, as does Section 2, and an indictment that alleges crimes covered by a part of Section 1 does not impose upon the defendant a duty to defend under Section 2 or against 'threat' provisions of Section 1." *Cole et al.* v. *State*, — Ark. —, —, 196 S. W. 2d 582, 586.

every accused in a criminal proceeding in all courts, state or federal. *In re Oliver*, — U. S. —, —, decided today, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De-Jonge* v. *Oregon*, 299 U. S. 353, 362.

Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. *Frank* v. *Mangum*, 237 U. S. 309, 327. *Cf. Mooney* v. *Holohan*, 294 U. S. 103, 113. That court has not affirmed these convictions on the basis of the trial petitioners were afforded. The convictions were for a violation of § 2. Petitioners urged in the State Supreme Court that the evidence was insufficient to support their conviction of a violation of § 2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution.[5] None of their contentions were passed upon by the State Supreme Court. It affirmed their conviction as though they

[5] The objections pressed in the Arkansas Supreme Court and also argued here were: (1) that petitioners were deprived of freedom of speech and assembly by reason of their convictions under § 2; (2) that their convictions were based upon a statute or charges too vague and indefinite to conform to due process; and (3) that Act 193 deprived them of the equal protection of the laws by making certain conduct, which otherwise would have been a misdemeanor, a felony when committed by striking workmen.

had been tried and convicted of a violation of § 1 when in truth they had been tried and convicted only of a violation of a single offense charged in § 2, an offense which is distinctly and substantially different from the offense charged in § 1. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law.

In the present state of the record we cannot pass upon those contentions which challenge the validity of § 2 of the Arkansas Act. The judgment is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.